Supreme Court, U.S.
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No. 02-

IN THE

Supreme Court of the United States

ARTHUR ANDERSEN LLP,

Petitioner,

v.

HARRY BERGER and BERNARD CUTLER, individually and on behalf of a class similarly situated,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the filing of a putative class action tolls the statute of limitations for purposes of filing, after class certification has been denied, a subsequent class action?

PARTIES TO THE PROCEEDING

In addition to the parties listed in the caption, the following parties either are or were at one time defendants in this action: Jasmine, Ltd., Irving M. Mangel, Melvin Twersky, Edward Maskaly, Samuel H. Mangel, Thomas Ciocco, Lujaco Ltd., Steven B. Sands, Martin Sands, Sands Brothers & Co. Ltd., McKowan Lowe & Co., Ltd., Evelyn Wong, Tony Ngai, Fishbein & Co., P.C.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISION INVOLVED	2
STATEMENT OF THE CASE	2
A. Nature Of The Case	2
B. Berger's Failed Effort To Certify A Class	3
C. Cutler's Attempt To Represent A Putative Class	4
D. The Court Of Appeals' Decision	6
REASONS FOR GRANTING THE PETITION	8
CONCLUSION	20

TABLE OF AUTHORITIES

CASES Page

Amchem Prods. v. *Windsor*, 521 U.S. 591 (1997) 18
American Pipe Constr. Co. v. *Utah*, 414 U.S. 538 (1974) 6, 10, 12
Andrews v. *Orr*, 851 F.2d 146 (6th Cir. 1988)..... 8, 13, 16,18
Basch v. *Ground Round, Inc.*, 139 F.3d 6 (1st Cir. 1998)..... 8, 13, 16, 17
Burns v. *Ersek*, 591 F. Supp. 837 (D. Minn. 1984)..... 19
Catholic Soc. Servs., Inc. v. *INS*, 232 F.3d 1139 (9th Cir. 2000).....9, 13, 14, 15, 17
Crown, Cork & Seal Co. v. *Parker*, 462 U.S. 345 (1983) 8, 9, 10, 12
Ferris v. *Cuevas*, 118 F.3d 122 (2d Cir. 1997)..... 17
Fleck v. *Cablevision VII, Inc.*, 807 F. Supp. 824 (D.D.C. 1992) 19
Fleming v. *Bank of Boston Corp.*,127 F.R.D. 30 (D. Mass. 1989)..... 19
General Tel. Co. of Southwest v. *Falcon*, 457 U.S. 147 (1982)..... 18
Gilchrist v. *Bolger*, 733 F.2d 1551 (11th Cir. 1984)..... 18
Goodman v. *Lukens Steel Co.*,777 F.2d 113 (3d Cir. 1985)..... 11
Griffin v. *Singletary*, 17 F.3d 356 (11th Cir. 1994)..... 8, 13, 19
Holmes v. *Fisher*, 854 F.2d 229 (7th Cir. 1988).... 11
Korwek v. *Hunt*, 827 F.2d 874 (2d Cir. 1987) 8, 13, 16, 18
Lampf, Preva, Lipkind, Prupis & Petigrow v. *Gilbertson*, 501 U.S. 350 (1991)..... 5

TABLE OF AUTHORITIES—continued

	Page
In re Quarterdeck Office Sys., Inc. Sec. Litig., No. CV-92-3970, 1994 WL 374452 (C.D. Cal. Mar. 24, 1994)	19
Robbin v. *Fluor Corp.*, 835 F.2d 213 (9th Cir. 1987)	13
Salazar-Calderon v. *Presidio Valley Farmers Ass'n*, 765 F.2d 1334 (5th Cir. 1985)	8, 13, 16, 18
Shields v. *Washington Bancorporation*, No. 90-1101, 1992 WL 88004 (D.D.C. Apr. 7, 1992)	19
Trief v. *Dun & Bradstreet Corp.*, 144 F.R.D. 193 (S.D.N.Y. 1992)	19

STATUTES AND REGULATION

15 U.S.C. § 77k	3
§ 77m	2, 5
§ 77v	3
§ 77z-1	11
§ 78aa	3
§ 78j	3
§ 78u-4	11
28 U.S.C. § 1331	3
17 C.F.R. § 240.10b-5	3

RULE

Fed. R. Civ. P. 23	4, 9, 11

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Arthur Andersen LLP respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit was entered on June 26, 2002 and is included in the Appendix ("App.") at 1a-17a. It has been officially reported and can be found at *McKowan Lowe & Co.* v. *Jasmine, Ltd.*, 295 F.3d 380 (3d Cir. 2002). The opinion of the district court reviewed by the Third Circuit was entered on June 30, 2000 and is included in the Appendix at 18a-79a. It, too, has been reported and can be found at *McKowan Lowe & Co.* v. *Jasmine, Ltd.*, 127 F. Supp. 2d 516 (D.N.J. 2000).

JURISDICTION

The court of appeals entered its opinion and judgment on June 26, 2002. Andersen did not file a petition for rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The statute at issue in this case is 15 U.S.C. § 77m, which provides:

> No action shall be maintained to enforce any liability created under section 77k or 77l(a)(2) of this title unless brought within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence, or, if the action is to enforce a liability created under section 77l(a)(1) of this title, unless brought within one year after the violation upon which it is based. In no event shall any such action be brought to enforce a liability created under section 77k or 77l(a)(1) of this title more than three years after the security was bona fide offered to the public, or under section 77l(a)(2) of this title more than three years after the sale.

STATEMENT OF THE CASE

A. Nature Of The Case.

In December 1993, Jasmine, Ltd., a shoe importer headquartered in New Jersey, made an initial public offering ("IPO") of its stock. Jasmine has since failed, and is now in Chapter 7 liquidation proceedings.

On November 27, 1995, Harry Berger filed a putative class action complaint in the Northern District of Illinois against certain of Jasmine's officers and directors, the underwriters of Jasmine's IPO, and others, not including Andersen. The

complaint sought damages pursuant to, *inter alia*, federal securities laws for alleged material misrepresentations in the prospectus used in Jasmine's IPO. The district court had original jurisdiction of this action pursuant to 15 U.S.C. §§ 77v, 78aa and 28 U.S.C. § 1331. The case was subsequently transferred, at Berger's request, from the Northern District of Illinois to the District of New Jersey.

Berger amended his complaint on November 6, 1996 to add petitioner as a defendant. Petitioner had been retained to audit Jasmine's financial statements for the fiscal year ending September 30, 1993. Andersen's audit report on these financial statements had been included in the registration statement Jasmine filed in December 1993 in connection with its IPO. Berger alleged that petitioner's audit report had failed to disclose material misstatements in Jasmine's financial statements in violation of Section 11 of the Securities Act of 1933, 15 U.S.C. § 77k, Section 10(b) of the Securities and Exchange Act of 1934, 15 U.S.C. § 78j, and Rule 10b-5, 17 C.F.R. § 240.10b-5. In addition, Berger asserted various common law claims against Andersen.

B. Berger's Failed Effort To Certify A Class.

Berger first sought class certification on August 4, 1997, more than a year and a half after he initiated this action. That motion was denied without prejudice on January 26, 1998. Berger then filed a new motion seeking class certification on February 19, 1998. Berger sought certification of a class as to all state and federal claims "'consisting of all purchasers of publicly-traded securities of Jasmine, Ltd. who purchased during the period from December 15, 1993 through and including June 20, 1995.'" App. 96a

The court denied Berger's motion because it concluded that Berger's claims were not typical of the class he sought to represent. Specifically, Berger had testified in his deposition that he had relied exclusively on the oral representations of his broker and had not seen the allegedly misstated prospectus

before his purchase. App. 100a-101a. Thus, the court concluded, Berger's proof of reliance, if any, would differ from those who had seen only the prospectus. *Id.* at 101a. In addition, although Berger was asserting claims under § 11 of the 1933 Act as a purchaser in Jasmine's IPO, there was evidence that Berger had purchased his stock in the secondary market. The district court thought this difference in timing further rendered Berger's claim atypical. *Id.*

The district court also concluded that Berger's motion should be denied because he was not an adequate representative for the class. The district court reviewed Berger's deposition testimony and noted that Berger had not been informed of his duties as class representative. This fact reflected poorly not only on Berger as the class representative, but also on the competency of Berger's counsel to represent the class. App. 103a-104a, 107a.

Although the district court denied Berger's motion, the court noted that the putative class had met the numerosity requirement of Fed. R. Civ. P. 23(a) and that all putative class members' claims involved common issues of law because all putative class members had allegedly suffered identical violations of the federal securities laws. App. 98a-99a. The district court's denial of class certification at this point focused on problems connected with Berger in particular, not on problems with bringing the claims Berger sought to pursue as a class action.

C. Cutler's Attempt To Represent A Putative Class.

After the district court denied Berger's motion for class certification, Berger's counsel advertised for a new class representative. Respondent Bernard Cutler responded, and on September 9, 1998, Berger filed a motion to permit Cutler to intervene as class representative.

Before the district court had ruled on the motion, respondents filed a motion to certify a settlement class (with either Berger or Cutler as class representative) as part of their

request for preliminary approval of a settlement agreement with Fishbein & Co., one of petitioner's co-defendants. The settlement concerned only the common law fraud counts that respondents had asserted against Fishbein; federal securities claims were not asserted against Fishbein because plaintiffs' counsel had permitted the limitations period to run with respect to this defendant.

The district court denied the motion because it could not conclude that Cutler's claims were typical of the class.[1] App. 91a. While Cutler apparently had purchased his stock during the period of the IPO and at the IPO price, the district court was concerned that Cutler, whose family had a close business and personal relationship with a Jasmine principal, might be subject to certain unique defenses. *Id.* at 85a-89a. The court recognized that Cutler might, after further factual development, be able to establish that his claims are, in fact, typical of a class, but that he had not done so up to that time. *Id.* at 91a.

Cutler still had not moved to certify a class for litigation purposes when, on November 12, 1999, petitioner moved for summary judgment on Cutler's class claims on the ground that they were barred by the statute of limitations. The statute of limitations for the federal securities claims raised in the complaint is one year from the date the plaintiff discovers the facts constituting the violation. 15 U.S.C. § 77m; *Lampf, Preva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350, 361-62 (1991). And the district court had already determined that plaintiffs were on inquiry notice of their claims no later than May 19, 1995. Because Cutler had not asserted his claims until well after May 19, 1996, his claims are time barred unless the limitation period has been tolled. Petitioner recognized that, pursuant to this Court's ruling in

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[1] The district court granted Cutler's motion to intervene on June 29, 1999, between the time that Cutler filed the motion to certify a settlement class and the district court's ruling on that motion.

American Pipe Construction Co. v. *Utah*, 414 U.S. 538 (1974), the limitations period on Cutler's *individual* claims had been tolled until the district court denied Berger's motion to certify a class. But, petitioner argued, the limitations period on Cutler's *class* claims were not tolled by *American Pipe*. While petitioner's motion was pending, Cutler moved to certify a class.

The district court ruled in favor of petitioner and against respondent on June 30, 2000. The district court noted that while *American Pipe* makes clear that the limitations period for Cutler's individual claims was tolled during the time Berger was litigating his putative class action, *American Pipe* did not decide whether the limitations period for class claims was also tolled. The court observed that "[t]he vast majority of the circuits which have examined this issue have declined to expand the *American Pipe* rule beyond individual claims to allow tolling for subsequent class actions." App. 36a-37a. The court found the rationale of these decisions persuasive: the court had already denied class certification and it was inappropriate to allow a potentially endless series of efforts to certify a class to delay indefinitely the time for litigating the putative class members' individual claims.

D. The Court Of Appeals' Decision.

The court of appeals reversed. The court of appeals recognized that it was inappropriate to read *American Pipe* to authorize "an endless succession of class filings." App. 9a. But the court reasoned that applying *American Pipe* to toll the limitations period for class claims filed after the denial of class certification will not always be inappropriate. According to the court of appeals, it is appropriate to deny tolling when the previous class action failed because of defects in the class itself. Applying *American Pipe* tolling under those circumstances would produce precisely the endless succession of doomed class filings that the district court had recognized would inappropriately extend the limitations period for individual claims. *Id.*

The court of appeals held that tolling was proper, however, when the previous class action failed because of defects in the class representative. The court appeared to focus on maintaining the availability of the class action device until some definitive determination of its propriety by a court. Under these circumstances, a subsequent class claim by a different putative class member might or might not fail, and the court could find "no good reason why" a class claim should not be given a chance to succeed. App. 14a. As the court of appeals viewed the matter, the absence of a reason not to toll provided the reason to toll.

In reaching its conclusion, the court of appeals acknowledged that its decision created a split among the circuits. The Eleventh Circuit, the court of appeals noted, had specifically held that *American Pipe* tolling was inappropriate "although the original class was rejected solely for inadequate representation." App. 12a-13a (citing *Griffin* v. *Singletary*, 17 F.3d 356 (11th Cir. 1994)). In addition, the court of appeals argued that the many cases relied upon by the district court from various other circuits should be read narrowly. According to the court of appeals, those cases denied *American Pipe* tolling to subsequent class claims only because the previous class failed due to defects in the class itself. *Id.* at 10a.

According to the court of appeals, tolling was appropriate in this case. The court stated that Berger's effort to certify a class:

> was not rejected because of any defects in the class itself but because of Berger's deficiencies as a class representative. In fact, in its evaluation of Berger's attempt to certify, the District Court found that a class would present common enough questions of law and fact and be sufficiently numerous to merit class treatment.

App. 10a. Therefore, the court of appeals remanded the case to the district court for a determination of whether Cutler is an

appropriate class representative and whether the case may be maintained as a class action. *Id.* at 15a.

REASONS FOR GRANTING THE PETITION

This Court's decisions in *American Pipe* and in *Crown, Cork & Seal Co.* v. *Parker*, 462 U.S. 345 (1983), leave no doubt that the limitations period for a putative class member's individual claims is tolled during the pendency of a timely filed class action lawsuit. Neither of those decisions squarely confronted whether the same tolling rule applies to a putative class member's class claims.

Three distinct views have emerged among the seven circuits to have confronted the question. The majority view, adopted by the First, Second, Fifth, Sixth and Eleventh Circuits, holds that *American Pipe* tolls the limitations period only for individual claims asserted by putative class members after class certification has been denied. *Basch* v. *Ground Round, Inc.*, 139 F.3d 6 (1st Cir. 1998); *Korwek* v. *Hunt*, 827 F.2d 874 (2d Cir. 1987); *Salazar-Calderon* v. *Presidio Valley Farmers Ass'n*, 765 F.2d 1334 (5th Cir. 1985); *Andrews* v. *Orr*, 851 F.2d 146 (6th Cir. 1988); *Griffin* v. *Singletary*, 17 F.3d 356 (11th Cir. 1994). The Third Circuit in this case has rejected that view and held that when class certification was denied because of defects in the class representative, and the district court has not definitively determined whether (assuming a suitable representative can be found) the claims are amenable to class treatment, *American Pipe* tolls the limitations period for subsequently filed class claims as well as individual claims. Finally, the Ninth Circuit has also held that *American Pipe* tolls the limitations period for subsequent class claims, but on a theory that is notably more narrow than the Third Circuit's. In a six to five *en banc* ruling, the Ninth Circuit held that *American Pipe* tolling should be applied to subsequent class claims when the previous class action was properly certified by the district court but later had to be decertified because a change in the law rendered the named

plaintiff inadequate to represent the class. *Catholic Soc. Servs., Inc.* v. *INS*, 232 F.3d 1139, 1147-49 (9th Cir. 2000) (en banc).[2]

This conflict is of relatively recent vintage. Until the Ninth Circuit's decision in *Catholic Social Services* just two years ago, no federal appellate court had ever held that *American Pipe* tolling applied to class claims. And even the Ninth Circuit's exceedingly narrow ruling split that court six to five, with the minority arguing that the majority's holding put the Ninth Circuit out of step with every circuit to have ruled on this question of national importance. *Id.* at 1153 (Kozinski dissenting). The Third Circuit has now extended the narrow ruling of *Catholic Social Services*, deepening the circuit split.

The Third Circuit's opinion in this case keeps open the class certification question, and continues the tolling of the limitations period as to individual actions, more than six years after the statutory limitations period had expired. Further, the opinion requires the district court to consider certifying a class, a question which is supposed to be decided "[a]s soon as practicable after the commencement of an action brought as a class action," Fed. R. Civ. P. 23(c)(1), nearly seven years after this case was first filed as a class action.

This case thus presents a mature circuit split on a question of national importance. It is crucial that a single, national rule govern the tolling of limitations periods for class action lawsuits. Nationwide class actions are particularly prone to forum shopping, and if different tolling rules prevail in different circuits, class counsel will be encouraged to file their class suits in those jurisdictions that are most forgiving of defects in previous filings. Only this Court can impose a single national rule that properly balances the various

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[2] This split among the circuits is substantially deeper than that which led this Court to last consider the scope of the *American Pipe* tolling rule. *Crown, Cork*, 462 U.S. at 348-49 & n.2 (noting two to one circuit split concerning question presented).

interests of plaintiffs in bringing their claims forward for adjudication, defendants in obtaining peace after the running of the limitations period, and the judicial system in the efficient disposition of class claims.

1. American Pipe *Tolling Protects Class Members' Individual Rights, Not Their Right To Litigate As A Class.* There is no question that the statute of limitations is tolled for a putative class member's individual claims during the pendency of a putative class action asserting those claims. This Court so held in *American Pipe* and *Crown, Cork*, explaining that "unless the statute of limitations was tolled by the filing of the class action, class members would not be able to rely on the existence of the suit to protect their rights." *Crown, Cork*, 462 U.S. at 350. If individual plaintiffs feared that their ability to assert timely claims was in danger, they would be encouraged to file those claims in court before the running of the limitations period to preserve their rights. Rule 23 was designed to resolve such common disputes efficiently by allowing a "truly representative suit" which would avoid the need for multiple filings to adjudicate multiple claims. *American Pipe*, 414 U.S. at 550-53. Tolling of individual claims pending a ruling on class certification thus follows directly from the policies inherent in Rule 23.

The same cannot be said about the tolling of class claims. Denying tolling for class claims is not inconsistent with Rule 23. Such a rule would not encourage plaintiffs to file a multiplicity of individual claims to preserve their rights, as those rights are preserved by *American Pipe*. To be sure, a rule that denies tolling for class claims may encourage additional filings in the early stages of class litigation, but the kinds of additional filings that would be encouraged would enhance, not undermine, the efficient resolution of the dispute. Specifically, putative class members may seek to intervene and become class representatives to the extent they are concerned that the putative class representative may be defective. But this is fully consistent with Rule 23's policy of

resolving the status of the case as a class action "[a]s soon as practicable." Fed. R. Civ. P. 23(c)(1). A rule that encourages those who wish to assert their claims in the class form to come forward and present themselves as potential class representatives will only enhance the ability of the court to make a definitive ruling on class status early in the litigation.[3]

Courts should consider not only the incentives for class members, but also the incentives for class counsel. "Class actions are likely to be lawyer- rather than client-driven." *Holmes* v. *Fisher*, 854 F.2d 229, 233 (7th Cir. 1988); *Goodman* v. *Lukens Steel Co.*, 777 F.2d 113, 124 (3d Cir. 1985) ("[I]t is counsel for the class who has the laboring oar. The class representatives furnish [only] the factual basis to invoke the jurisdiction of the court and provide the outline of the controversy...."). In this case, potential class representatives did not just appear at class counsel's door; rather, class counsel advertised for a class representative in an effort to keep the class case alive after the district court denied Berger's motion for class certification. The fact is that in this case, as in many other class actions, part of class counsel's labors in moving a class action forward involves finding an appropriate class representative. A rule that encourages class counsel to find an appropriate class representative as early as possible in the litigation rather than advertising for one after the court has rejected a proffered plaintiff supports Rule 23's express preference for an early determination of the class action status of the case.

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[3] With respect to class actions asserting federal securities claims, the policy of identifying a lead plaintiff early in the litigation has been codified at 15 U.S.C. §§ 77z-1, 78u-4, which establish special procedures and time limitations for putative class members who wish to serve as lead plaintiff. The district court determined that those provisions are not applicable in this case. The Third Circuit's analysis is generally applicable to all class actions, and not narrowly confined to securities law class actions.

Of course, in establishing a tolling rule, the courts should remain mindful of the interests and rights of class members. And that is exactly what *American Pipe* and *Crown, Cork* do: they protect the individual rights of individual class members while class counsel and the defendant litigate the class certification question. When this Court in *American Pipe* first announced the tolling rule, it linked the rationale for tolling with the rationale, based in the Due Process Clause, for providing putative class members the right to opt out of a certified class. 414 U.S. at 547-49. The class action device was not intended and should not be permitted to undermine an individual's right to prosecute his or her claim individually. Tolling protects that right by ensuring that a class member's individual claim does not die while that class member awaits a class certification ruling. *Id.* at 552. But an individual member of a class has no Due Process right to present a claim as a class action. As this Court said in *Crown, Cork*: "Once the statute of limitations has been tolled, it remains tolled for all members of the putative class until class certification is denied. At that point, class members may choose to file *their own suits* ...." 462 U.S. at 354 (emphasis added).

Even the limited tolling rule adopted by this Court in *American Pipe* elicited words of caution from some Justices. As Justice Powell, writing also for both then-Justice Rehnquist and Justice O'Connor noted, "The tolling rule of *American Pipe* is a generous one, inviting abuse." *Crown, Cork*, 462 U.S. at 354 (Powell, J., concurring); see also *American Pipe*, 414 U.S. at 561 (Blackmun, J., concurring) (warning that "[o]ur decision ... must not be regarded as encouragement to lawyers in a case of this kind to frame their pleadings as a class action, intentionally, to attract and save members of the purported class who have slept on their rights"). In short, the tolling rule of *American Pipe* was narrow, designed to protect the individual rights of class members, not to prolong the period for bringing class claims, and this Court was conscious of its potential for abuse. This

case presents the opportunity for this Court to protect against that potential for abuse.

2. The Circuits Are Deeply Split. The narrow understanding of *American Pipe* was the uniform view among the courts of appeals until just two years ago. Every circuit to have considered the question recognized that *American Pipe* tolling should not be used to permit class counsel to relitigate class certification issues. As the First Circuit put it: "We do not believe the tolling rules were meant to permit the stacking of class actions." *Basch*, 139 F.3d at 11. The First Circuit's view echoed that of four other courts of appeals. *Korwek*, 827 F.2d at 879 (stating "the tolling rule established by *American Pipe* ... was not intended to be applied to suspend the running of statutes of limitations for class action suits filed after a definitive determination of class certification") (Second Circuit); *Salazar-Calderon*, 765 F.2d at 1351 ("Plaintiffs have no authority for their contention that putative class members may piggyback one class action onto another and thus toll the statute of limitations indefinitely, nor have we found any.") (Fifth Circuit); *Andrews*, 851 F.2d at 149 ("The courts of appeals that have dealt with this issue appear to be in unanimous agreement that the pendency of a previously filed class action does not toll the limtiations period for additional class actions by putative members of the original asserted class.") (Sixth Circuit); *Griffin*, 17 F.3d at 359 ("This case illustrates the wisdom of the rule against piggybacked class actions.") (Eleventh Circuit).

The Ninth Circuit, which had previously subscribed to the view of these five other circuits, *Robbin* v. *Fluor Corp.*, 835 F.2d 213 (9th Cir. 1987), became, in 2000, the first court of appeals to permit *American Pipe* tolling to apply to class claims filed after a previous motion for class certification had been denied. *Catholic Soc. Servs.*, 232 F.3d at 1147-49. The procedural history in *Catholic Social Services* is complex, and crucial to understanding the narrow holding of that court.

Catholic Social Services involved a challenge to an INS rule limiting the persons eligible for legalization under the Immigration Reform and Control Act of 1986. The district court had certified a class that included six different named plaintiffs, three of whom had been prevented from applying by INS officials because the challenged INS rule made them ineligible, and three others who had not even appeared at the INS office because they had been told that others like them were told not to apply. *Id.* at 1143. While the government's appeal from the class certification ruling was pending, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"). *Id.* at 1144. That legislation made clear that the failure to file or attempt to file an application (with the application fee) within a specified period of time would deprive the federal courts of jurisdiction over the class's claim. *Id.* The Ninth Circuit ruled that IIRIRA meant that the class the district court had certified lacked any adequate representative because no named plaintiff had tendered a completed application, with fee, to the INS. *Id.* Thereafter, plaintiffs filed a new class action with named plaintiffs who satisfied IIRIRA, and the district court, once again, certified a class. *Id.*

The Ninth Circuit had to determine whether the first, certified class action had tolled the limitations period so that the new named plaintiffs could assert a new class action. In a sharply divided *en banc* ruling, the court held that it had. The majority explained that its decision turned on the fact that class certification had been previously granted: "If class action certification had been denied ... and if plaintiffs in this action were seeking to relitigate the correctness of that denial, we would not permit plaintiffs to bring a class action." *Id.* at 1147. The majority noted that the Eleventh Circuit had held in *Griffin* that *American Pipe* would not toll the limitations period for subsequent class actions after the denial of class certification even when the denial was due to a defect in the class representative. *Id.* at 1148. But, the majority reasoned,

this case was different because "there is no dispute ... that the classes in the first action were properly certified." *Id.* at 1149. In short, the majority's decision was limited to a situation in which the first class action had been properly certified, and through no fault of either the plaintiffs or their counsel, a change in the law required decertification. *Id.* ("Plaintiffs in the class action now before us thus do not seek to cure *any* procedural deficiencies in the classes under Rule 23 certified in the first action because there were none.") (emphasis added).

Even this exceedingly narrow decision elicited a sharp dissent from five members of the *en banc* court. *Id.* at 1153 (Kozinski dissenting); *id.* at 1156 (Graber concurring in part and disssenting in part). The dissenters thought that the majority's focus on whether the plaintiffs were at fault was mistaken. Applying *American Pipe* tolling to subsequent class claims, the dissenters observed, not only keeps alive the possibility of class treatment, but it further delays the time for filing individual suits should the subsequent class action also fail. "This would stretch the statute of limitations for years, perhaps decades, past its original expiration date." *Id.* at 1154 (Kozinski, dissenting). Therefore, the dissenters reasoned, "[w]hether the *Crown, Cork* rationale can be employed more than once does not turn on whether plaintiffs were somehow at fault when the earlier panel dismissed the class action. Instead, as the other circuits have recognized, it is a matter of balancing the interests of plaintiffs in litigating the case by way of class action against the interests of defendants in the period of repose." *Id.* at 1155 (Kozinski dissenting). The dissenters would have followed the views of the other circuits and concluded the potential for endlessly deferring the limitations period shifted the balance too far against defendants.

The Third Circuit, in the case under review, took a step that even the Ninth Circuit majority was unwilling to take. The Third Circuit broadly held that whenever the previous class

action failed because of a defect in the class representative, and whenever the district court has not reached a conclusion regarding the possibility of the claims being resolved through the class action device, then *American Pipe* tolling applies to permit the filing of subsequent class claims. App. 15a. The Third Circuit's ruling is not limited to any peculiar procedural history, as was the Ninth Circuit's decision; rather, it asserts, for the first time, a broad exception to the previously well accepted rule that *American Pipe* tolling does not apply to subsequent class claims filed after class certification has already been denied. Only this Court can resolve the differing views of *American Pipe* that now prevail among the various circuits.

3. The Circuit Split Cannot Be Narrowed, And Even Under The Narrowest Reading The Circuits Are Split. The Third Circuit argued that its decision was not in conflict with those of the First, Second, and Fifth Circuits. The Third Circuit correctly noted that, as a factual matter, in each of the cases decided by those other circuits, the first class action failed not only because of defects in the class representative, but because the district court had concluded that the claims themselves were not amenable to class treatment. App 9a; *Basch*, 139 F.3d at 8 n.4 (first class denied certification because "plaintiffs had not shown that ... all class members [were] similarly situated"); *Korwek*, 827 F.2d at 876 (previous class narrowed because of manageability concerns); *Salazar-Calderon*, 765 F.2d at 1350 (previous class denied certification because common questions did not predominate and because class action was not superior method).[4] The Third Circuit's statement of the facts in these cases is fair, but the court still completely fails to address their reasoning. That is, the Third Circuit failed to point to any reasoning in any of these earlier circuit decisions which indicates that

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[4] The Sixth Circuit's decision does not state the reason the previous request for class certification was denied. *Andrews*, 851 F.2d at 147-48.

those decisions turned on the fact that the previous denial of class certification was not limited to defects in the class representative. And, in fact, those decisions cannot be read so narrowly.

As the Third Circuit reads them, *Basch*, *Korwek*, and *Salazar-Calderon* are about issue preclusion or law of the case. *Basch*, *Korwek*, and *Salazar-Calderon* refused to apply *American Pipe* tolling, according to the Third Circuit, because doing so would give the subsequent class member a chance to relitigate an issue (whether the class members are similarly situated, as in *Basch*, or whether class treatment presents manageability problems, as in *Korwek*) that the district court has already decided. When the previous denial of class certification is limited to defects in the class representative, the subsequent class member's effort to have himself or herself declared class representative does not relitigate anything. Thus, tolling should apply.

The Third Circuit fails to appreciate that if *Basch*, *Korwek* and *Salazar-Calderon* had rested upon issue preclusion, these courts would have said so. But they did not. *Catholic Soc. Servs.*, 232 F.3d at 1155 ("If . . . *Korwek* had been concerned that plaintiffs were relitigating issues previously decided, they could have resolved the case on collateral estoppel grounds.") (Kozinski, dissenting).[5] Instead of relying on issue preclusion, those courts relied on the potential for the statute of limitations to be extended indefinitely if *American Pipe* were held to toll for subsequent class claims. *Basch*, 139 F.3d at 12 ("After class certification has been denied in an action,

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[5] While collateral estoppel ordinarily may not be applied against a plaintiff who was not a party to earlier litigation, when an absent party is determined to be in privity with the party who had a full and fair opportunity to litigate an issue, that absent party may be bound. The Second Circuit has previously recognized that a named plaintiff, suing on behalf of a class, is in privity with an absent class member who later seeks to relitigate the issue, at least when both are represented by the same counsel. *Ferris* v. *Cuevas*, 118 F.3d 122, 126-28 (2d Cir. 1997).

potential individual plaintiffs cannot extend that limitations period by relying on successive class actions which allege the same class and the same claims."); *Korwek*, 827 F.2d at 879 (stating that "the tolling rule established by *American Pipe* ... was not intended to be applied to suspend the running of statutes of limitations for class action suits filed after a definitive determination of class certification"); *Salazar-Calderon*, 765 F.2d at 1351 ("Plaintiffs have no authority for their contention that putative class members may piggyback one class action onto another and thus toll the statute of limitations indefinitely, nor have we found any."). Nothing in any of these cases suggests that the results would have been different had the first motion for class certification been denied for reasons related only to defects in the class representative.[6] As if to emphasize this point, the Sixth Circuit in *Andrews* did not even state the reason why the original effort to certify a class failed. *Andrews*, 851 F.2d at 147-48. It simply made no difference to the court.

And even if these other circuit decisions could be read so narrowly, there is still a clear circuit split on the narrower

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[6] According to the Third Circuit, certification denials based upon apparent defects in the class involve a "definitive[] reject[ion]" that class treatment is inappropriate for the claims asserted. But certification denials based upon defects in the named plaintiff do not involve such a "definitive[] reject[ion]." App. 10a. This distinction collapses upon scrutiny. After all, the named plaintiff bears the burden to prove all elements required by Rule 23 to certify a class. *Amchem Prods.* v. *Windsor*, 521 U.S. 591, 614 (1997). Class certification may be denied because a named plaintiff failed to present sufficient evidence that there are common questions of law or fact among potential class members or that the class is sufficiently numerous to justify class treatment, even though such a presentation may be possible. *General Tel. Co. of Southwest* v. *Falcon*, 457 U.S. 147, 158 & n.15 (1982); *Gilchrist* v. *Bolger*, 733 F.2d 1551, 1556 (11th Cir. 1984). A district court that denies certification due to a failure of proof has no more "definitively rejected" class treatment than a district court that has denied certification based on the named plaintiff's inadequacy to represent the class.

question whether *American Pipe* tolls the limitations period for subsequent class claims after an earlier motion for class certification failed due exclusively to defects in the class representative. The Third Circuit's opinion in this case (1) squarely conflicts with the decision of the Eleventh Circuit in *Griffin*, and (2) extends the narrow exception that the Ninth Circuit created in *Catholic Social Services* with respect even to this narrow question. *Griffin* applied the analysis of *Korwek* and *Salazar-Calderon* to a case in which the earlier class action failed solely because the class representative was not proper. *Griffin*, 17 F.3d at 357-58. Even under these circumstances, the Eleventh Circuit reasoned, "This case illustrates the wisdom of the rule against piggybacked class actions. Fifteen years after the *Griffin* lawsuit was filed, the class action issues are still being litigated, and we decline to adopt any rule that has the potential for prolonging litigation about class representation any further." *Id.* at 359. And, as discussed above, *Catholic Social Services* carefully restricted its holding to cases in which a change in the law had rendered a previously and properly certified class improper, going so far as to distinguish *Griffin*. In short, the three circuits to have considered even the most narrowly defined question presented by this case have reached three different conclusions.[7] Under these circumstances, this Court should grant review and decide the proper tolling rule arising out of *American Pipe*.

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[7] In addition, like the circuits, several district courts have divided on the propriety of applying *American Pipe* tolling to subsequent class claims, even when the previous class was not certified solely because of defects in the class representative. *Compare Fleck* v. *Cablevision VII, Inc.*, 807 F. Supp. 824 (D.D.C. 1992) (no tolling), *Fleming* v. *Bank of Boston Corp.*, 127 F.R.D. 30 (D. Mass. 1989) (same), *and Burns* v. *Ersek*, 591 F. Supp. 837 (D. Minn. 1984) (same), *with Trief* v. *Dun & Bradstreet Corp.*, 144 F.R.D. 193 (S.D.N.Y. 1992) (allowing tolling), *In re Quarterdeck Office Sys., Inc. Sec. Litig.*, No. CV-92-3970, 1994 WL 374452 (C.D. Cal. Mar. 24, 1994) (same), *and Shields* v. *Washington Bancorporation*, No. 90-1101, 1992 WL 88004 (D.D.C. Apr. 7, 1992) (same).

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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September 24, 2002

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
THIRD CIRCUIT

No. 00-3728

MCKOWAN LOWE & CO., LTD.

v.

JASMINE, LTD., IRVING MANGEL, JAMES STEWART, JACK AEZEN, LUJACO, LTD., FISHBEIN & COMPANY, P.C., SAMUEL J. MANGEL, UNITED JERSEY BANK, MARVIN WEISS, ARTHUR ANDERSEN, L.L.P.

HARRY BERGER, individually and on behalf of a class similarly situated; BERNARD L. CUTLER, individually and on behalf of a class similarly situated

v.

JASMINE LTD., IRVING M. MANGEL, MELVIN TWERSKY, EDWARD W. MASKALY, SAMUEL J. MANGEL, STEVEN B. SANDS, MARTIN SANDS, THOMAS CIOCCO, SANDS BROTHERS & CO., MCKOWAN LOWE & COMPANY, LTD., EVELYN WONG, TONY NGAI, LUJACO, LTD.

HARRY BERGER and BERNARD CUTLER, individually and on behalf of a class similarly situated,

Appellants.

Argued Oct. 29, 2001
Filed June 26, 2002

BEFORE: SLOVITER, NYGAARD and AMBRO, Circuit Judges.

SLOVITER, Circuit Judge.

This interlocutory appeal of the District Court's order denying class certification is before us on this court's grant of a petition for review pursuant to Rule 23(f) of the Federal Rules of Civil Procedure. The issue framed by the petition is

> [w]hether the commencement of a class action tolls the limitations period for intervening class members to bring claims on behalf of a class where a determination has not been made whether those claims are appropriate for class certification?

App. at 75.

Plaintiff-appellant Bernard Cutler appeals from the District Court's order granting summary judgment against Cutler's class claims alleging violations of Section 11 of the Securities Act of 1933, 15 U.S.C. § 77k (2002), which creates a private right of action for claims of material misrepresentation or omission in a registration statement. The District Court concluded that although the statute of limitations was tolled for Cutler's individual claims, his claims on behalf of the class were time-barred.

Under the Supreme Court's decision in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 94 S.Ct. 756, 38 L.Ed.2d 713 (1974), the filing of a class action complaint tolls the statute of limitations for all members of the putative class who, following the denial of certification, intervene or file an independent action. *See also Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 350, 103 S.Ct. 2392, 76 L.Ed.2d 628 (1983). It is therefore established that *American Pipe* tolling applies to intervenors who assert claims in their individual capacity, but this court has not yet decided whether *American Pipe* tolling applies to an intervenor as a proposed class representative where the class has neither been certified nor definitively rejected.

I.

BACKGROUND

In December 1993, Jasmine, Ltd., a shoe importer headquartered in New Jersey, completed an initial public offering (IPO) of common stock. In November 1995, Harry Berger, a shareholder, filed suit in federal court on behalf of himself and a class of similarly situated purchasers alleging violations of federal and state securities laws in connection with the IPO.[1] According to Berger, Jasmine and members of its management, Irving Mangel, Samuel Mangel, Melvin Twersky, Edward Maskaly and Thomas Ciocco, Jasmine's auditors, Arthur Andersen LLP and Fishbein & Co., P.C., the IPO underwriter, Sands Brothers & Co., Ltd. and two of its principals, Jasmine's buying agent in Hong Kong, McKowan Lowe & Co., Ltd., and two of its officers, Evelyn Wong and Tony Ngai, and a corporation controlled by the Mangels, Lujaco, Ltd., all participated in a scheme to misstate Jasmine's financial statements to conceal Jasmine's substantial debt to McKowan Lowe. Based on similar charges, in 1997 the SEC had obtained consent judgments against members of Jasmine's former management, under which they agreed to pay fines ranging from $100,000 to $7,293. *Securities & Exchange Commission v. Irving M. Mangel*, No. 97-1977 (D.D.C.), Litigation Release No. 15465, 65 S.E.C. Docket 645 (Aug. 28, 1997), *available at* http://www.sec.gov/litigation/litreleases/lr15465.txt. Tony Ngai and Evelyn Wong of McKowan Lowe also settled with the SEC. *Ngai King Tak*, Securities Act of 1933 Release No. 7443, 65 S.E.C. Docket 540 (Aug. 28, 1997), *available at* http://www.sec.gov/litigation/admin/3438988.txt. Jasmine itself is currently in Chapter 7 liquidation proceedings.

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[1] Suit was originally filed in the United States District Court for the Northern District of Illinois and then transferred at Berger's motion to the District of New Jersey.

The statute of limitations for liability created under Section 11, the only claim implicated in this appeal, is "one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence." 15 U.S.C. § 77m. The District Court found that "Berger was first given inquiry notice [by Jasmine's] May 19, 1995 form 8-K which disclosed irregularities discovered by BDO Seidman, and that warnings in the prospectus by themselves did not create notice." App. at 31. Berger's complaint was filed in November, 1995 and was thus within the applicable statute of limitations. The District Court found a class would present common questions of law and fact, and would be sufficiently numerous, but it rejected Berger's motion for class certification in August of 1998 based on its determination that Berger's claims failed to meet Rule 23's typicality requirement and because Berger would not provide adequate representation of the class. App. at 15.

On September 9, 1998, promptly after the District Court's opinion was filed, Bernard Cutler successfully moved to intervene. Absent tolling, Cutler's claims would be time-barred, as he did not intervene until well over the expiration of the one-year statute of limitations. The District Court determined that Cutler could maintain his individual claims because "from November 17, 1995 [when Berger filed his complaint,] until August 6, 1998 when [Berger's motion for] class certification was denied, the statute of limitations was tolled" under *American Pipe*. App. at 31. The District Court declined to evaluate Cutler's qualifications to represent a subclass of the original Berger class, as it rejected Cutler's proposed Section 11 class claim only on the ground that it was barred by the statute of limitations.

II.

JURISDICTION AND STANDARD OF REVIEW

The District Court had jurisdiction pursuant to 15 U.S.C. § 77v. On November 27, 2000, this court granted Cutler's

Rule 23(f) petition. Rule 23(f) was "adopted under the power conferred by 28 U.S.C. § 1292(e)." Fed.R.Civ.P. 23(f) advisory committee's notes. The parties agree that this court reviews de novo the District Court's summary judgment dismissal of Cutler's class claims for failure to comply with the statute of limitations. *See, e.g., Lusardi v. Xerox Corp.*, 975 F.2d 964, 974 (3d Cir.1992); *Davis v. Thornburgh*, 903 F.2d 212, 213 n. 2 (3d Cir.1990).

III.

DISCUSSION

On appeal, Cutler asserts that the District Court erred in refusing to toll the statute of limitations for his class claims. He contends that tolling his class claims is most consistent with the policies undergirding *American Pipe*, and is supported by the authority of the majority of the courts to consider the issue. Cutler concedes that his case would be considerably more problematic if the District Court had conclusively determined that this case were inappropriate for resolution via class action. To distinguish his own circumstances from that situation he points out that the District Court rejected Berger's prior motions to certify a class based entirely on its perception of Berger's inadequacies as the proffered representative. He suggests that this case, like many securities actions, presents a paradigmatic example of the sort of claims the class device was designed to help vindicate—those claims too numerous and small to warrant individual action but conjoined representing a substantial case. *See, e.g., Eisenberg v. Gagnon*, 766 F.2d 770, 785 (3d Cir.1985) (observing "[c]lass actions are a particularly appropriate and desirable means to resolve claims based on the securities laws, 'since the effectiveness of the securities laws may depend in large measure on the application of the class action device'") (quoting *Kahan v. Rosenstiel*, 424 F.2d 161, 169 (3d Cir.1970)); John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic*

Theory for Private Enforcement of Law Through Class and Derivative Actions, 86 Colum.L.Rev. 669, 681-83 (1986) (applying economic theory to explain frequent use of class procedure in securities litigation).

The Supreme Court has enunciated two rationales for the *American Pipe* rule, which tolls the statute of limitations for putative members of a class pending denial of class certification. First, class actions are "designed to avoid, rather than encourage, unnecessary filing of repetitious papers and motions." *American Pipe*, 414 U.S. at 550, 94 S.Ct. 756. If the claims of unnamed plaintiffs were not tolled, claimants would have an incentive to file claims themselves to protect their causes of action, "precisely the multiplicity of activity which Rule 23 was designed to avoid." *Id.* at 551, 94 S.Ct. 756; *see also Crown Cork & Seal Co.*, 462 U.S. at 350-51, 103 S.Ct. 2392.

The *American Pipe* rule encourages unnamed plaintiffs to rely on the class action already filed on their behalf. The class action procedure is protective of passive, even unwitting, members of the class. As the Court observed, "[n]ot until the existence and limits of the class have been established and notice of membership has been sent does a class member have any duty to take note of the suit or to exercise any responsibility with respect to it in order to profit from the eventual outcome of the case." *American Pipe*, 414 U.S. at 552, 94 S.Ct. 756.

Second, the Court in *American Pipe* held that the tolling rule is consistent with the twin functions of statutes of limitations—providing defendants with timely notice and avoiding stale claims—because the action is tolled only by timely service of the class complaint on the defendants by the named plaintiffs. *Id.* at 554-55, 94 S.Ct. 756; *see also Crown Cork & Seal Co.*, 462 U.S. at 352, 103 S.Ct. 2392 (noting

"[l]imitations periods are intended to put defendants on notice of adverse claims and to prevent plaintiffs from sleeping on their rights").

Cutler argues that the same rationales are equally applicable to tolling his class claims. He finds support in two decisions of this court. In *Haas v. Pittsburgh National Bank*, 526 F.2d 1083 (3d Cir.1975), we approved *American Pipe* tolling for a later class representative on a claim that the original representative was without standing to pursue. In 1972, Mary Haas had filed a class complaint against three banks, one of which was Equibank, claiming they had charged usurious interest rates. Although she had accounts at the two other banks, she had never had an account at Equibank. Nonetheless, in a 1973 order the district court granted Haas class representative status as to all three banks. Later, on January 21, 1974, in light of decisions by the Supreme Court and Ninth Circuit, the district court determined it had improperly certified Haas as to Equibank. In the same order the court permitted the amendment of the complaint to add a new class representative who had had an account with Equibank. That named plaintiff, John Mitchell, was added shortly thereafter.

The district court which had permitted Mitchell's addition subsequently ruled his claims were time-barred. The relevant statute of limitations was two years. Equibank had discontinued the practice that was the subject of the complaint more than two years prior to January 21, 1974, the date the district court had first permitted substitution of a new class representative.

On appeal, this court agreed with the district court that Haas was not a proper plaintiff as to Equibank. However, we reversed and remanded the dismissal of the class claim. We held, based on *American Pipe*, that the statute of limitations for Mitchell was tolled from November 13, 1972, the date Haas had filed her original complaint. Looking to *American*

Pipe, we noted that Haas's complaint provided Equibank with notice of "the claims against which [it] would be required to defend and also 'the number and generic identities of the potential plaintiffs.'" *Id.* at 1097. We concluded by observing "[t]hese plaintiffs were in existence at the time the action was originally brought and were described as claimants in the complaint. The only change effectuated by the district court's [January 21, 1974] order was the prompt addition of a nominal plaintiff who held an Equibank card." *Id.* Even were *Haas* not controlling, it certainly suggests that *American Pipe* tolling applies to class claims.

In the other case Cutler cites, *Goodman v. Lukens Steel Co.*, 777 F.2d 113 (3d Cir.1985), this court reviewed the district court's grant of injunctive relief on behalf of a class in a Title VII case. We determined as to one claim on which the plaintiffs had prevailed that none of the named representatives were adequate to represent the class. Based on the lack of a qualified class representative, we vacated the underlying findings on that claim. *Id.* at 124. However, in the interest of judicial economy, we directed that the district court "explore the possibility of intervention by qualified class representatives" on remand, *id.*, concluding that "[s]uch a suit would be timely since the commencement of the class action tolled the statute of limitations as to members of the class" under *American Pipe, id.* at 124 n. 8.

Defendant Arthur Andersen seeks to distinguish *Haas* based on our emphasis in that case on the district court's certification of a class, and characterizes our observation in *Goodman* as dictum, pointing out that there too the district court had certified a class. Andersen also argues that in both *Haas* and *Goodman* a change in the law caused the class representatives to become unfit after the district courts' certifications. Andersen points out that no class has been certified in this case, and thus no change in the law could prejudice potential class members norcould absent class members have relied on a prior certification.

Andersen, joined by Sands Brothers, cites as authority for its position a number of courts of appeals' decisions which treat a related, although Cutler argues distinguishable, situation. In those cases the issue was the application of *American Pipe* tolling to subsequent intervenors or sequential class actions after there had been definitive denials of class certification in the original action. For example, in *Korwek v. Hunt*, 827 F.2d 874 (2d Cir.1987), an early case in this line, the plaintiffs-appellants had

> filed a complaint alleging class claims identical theoretically and temporally to those raised in a previously filed class action suit which was denied class certification mainly because of overwhelming manageability difficulties. Appellants ignored the district court's express finding that the original action was unwieldy, first when attempting to intervene and expand the limited *Gordon* class, and again when filing, what was essentially a duplicate of the original complaint.

Id. at 879. The Second Circuit refused to extend tolling under those circumstances, concluding, "The Supreme Court in *American Pipe* and *Crown, Cork* certainly did not intend to afford plaintiffs the opportunity to argue and reargue the question of class certification by filing new but repetitive complaints." *Id.*

The underlying concern in *Korwek* and the articulated basis for the result was that application of *American Pipe* tolling to successive attempts to certify a previously rejected class would sanction an endless succession of class filings. *Korwek* held that *American Pipe* tolling does not operate to permit plaintiffs to relitigate the propriety of a class action. The great weight of authority has adopted similar reasoning and has rejected the applicability of *American Pipe* tolling to such successive class actions. *See, e.g., Basch v. Ground Round, Inc.*, 139 F.3d 6, 11-12 (1st Cir.1998) (an action held to be inappropriate for class treatment does not toll statute of

limitations for subsequent class actions); *Andrews v. Orr*, 851 F.2d 146, 148-49 (6th Cir.1988) (same); *Robbin v. Fluor Corp.*, 835 F.2d 213, 214 (9th Cir.1987) (same); *Salazar-Calderon v. Presidio Valley Farmers Ass'n*, 765 F.2d 1334, 1351 (5th Cir.1985) (rejecting *American Pipe* tolling for two subsequent actions that depended on a first action for their timeliness).

We agree with the rationale of those cases and Cutler does not argue that they were decided incorrectly. Instead, Cutler insists that his situation is different. Unlike the *Korwek* plaintiffs, Cutler is not attempting to resuscitate a class that a court has held to be inappropriate as a class action. The class certification motion of Cutler's predecessor, Berger (by whose complaint Cutler would have his claims tolled), was not rejected because of any defects in the class itself but because of Berger's deficiencies as a class representative. In fact, in its evaluation of Berger's attempt to certify, the District Court found that a class would present common enough questions of law and fact and be sufficiently numerous to merit class treatment. Thus Cutler argues that although the *Korwek* policy against perpetual relitigation of decided class issues is a sound one, it does not apply to him.

Only a handful of courts have considered whether class claims should be tolled when the class device has not been definitively rejected, and they have generally concluded that *American Pipe* tolling is permitted in that situation. Many of those cases presented a situation, such as that here, where the original motion for class certification was denied because the class representative was inadequate.

For example, in *In re Quarterdeck Office Systems, Inc. Securities Litigation*, CV-92-3970-DWW (GHKx), 1994 WL 374452 (Mar. 24, 1994), two investors filed a securities fraud action against Quarterdeck, its officers and directors, and three venture capital firms following the fall of the company's stock shortly after its IPO. *Id.* at *1. The court rejected

their motion for class certification based on their inadequacies as class representatives. However, the court permitted intervention by other investors after the statute of limitations had run, holding that the intervenors' class claims were tolled under *American Pipe*. *Id.* at *2, 5.

The court recognized there were two groups of cases applying the *American Pipe* rule to subsequent class actions. The first group, exemplified by *Korwek* and the Ninth Circuit's decision in *Robbin v. Fluor*, "involved either an attempt to file an entirely separate class action lawsuit after the dismissal of an earlier action, or an attempt to bring a later class action after the court had determined that proceeding as a class action was an inappropriate method of resolving the lawsuit." *Id.* at *4. The district court recognized that the courts have universally refused to extend *American Pipe* tolling to the subsequent class but stated that that group of cases differs from cases involving a later class action that is brought "in an attempt to find a more appropriate class representative." *Id.*

In reaching its conclusion in *Quarterdeck*, the district court stated:

> This court has not determined that proceeding as a class action is inappropriate, merely that [the first putative class representatives] are not proper class representative. . . . [I]f this court were to hold that the statute is not tolled for these intervening plaintiffs to raise class allegations, it would . . . extend[ ] the holdings of *Korwek* and *Robbin* to cases in which a proper class representative is being sought within the originally filed lawsuit.

Id. at *5.

Other courts faced with similar circumstances have reached similar conclusions. *See, e.g., Shields v. Washington Bancorporation*, 1992 WL 88004, *1-3 (D.D.C. Apr. 7, 1992)

(permitting tolling for intervenor over a year after original complainant's motion for class certification dismissed because complainant was inadequate representative); *In re Crazy Eddie Sec. Litig.*, 802 F.Supp. 804, 813 (E.D.N.Y. 1992) (observing, on determining that named plaintiffs of certified class were inadequate, that "a second class action would not be an attempt to relitigate the question of class certification by filing repetitive claims"); *Trief v. Dun & Bradstreet Corp.*, 144 F.R.D. 193, 202-03 (S.D.N.Y.1992) (determining tolling for intervenor appropriate where original named plaintiffs were inadequate, although defendants had conceded classaction device appropriate); *Shields v. Smith*, No. 90-349, 1992 U.S.Dist. LEXIS 15718, *5-10 (N.D.Cal. Aug. 14, 1992) (permitting tolling to intervenor following denial of original class for inadequate representation); *see also Alidina v. Penton Media, Inc.*, 143 F.Supp.2d 363, 365-66 n. 1 (S.D.N.Y.2001) (permitting tolling where certification conditionally denied); *Fleming v. Bank of Boston Corp.*, 127 F.R.D. 30, 35-37 (D.Mass.1989) (one criteria for denying intervention was that intervenors could thereby avoid *Korwek* line of cases and renew certification attempts); *Fred Meyer of Alaska, Inc. v. Adams*, 963 P.2d 1025, 1029 (Alaska 1998) (permitting tolling following conditionally denied certification). *But see Fleck v. Cablevision VII, Inc.*, 807 F.Supp. 824, 825-27 (D.D.C.1992) (interpreting *Korwek* line of cases to forbid tolling to proposed new class representative).

In contrast to these cases, the Eleventh Circuit in *Griffin v. Singletary*, 17 F.3d 356 (11th Cir.1994), a Title VII action, followed the *Korwek* line of cases to reject intervenors' class claims, although the original class was rejected solely for inadequate representation. The district court had initially certified a class, but on interlocutory appeal the court of appeals held that the named representatives were inadequate and vacated the certification order. On remand, after the statute of limitations had run, five individuals moved to intervene as class representatives and for recertification of the

class. The district court denied their motions, and the court of appeals affirmed.

The court concluded that *Korwek* controlled. It stated, "plaintiffs may not 'piggyback one class action onto another' and thereby engage in endless rounds of litigation in the district court and in this Court over the adequacy of successive named plaintiffs to serve as class representatives." *Id.* at 359 (quoting *Salazar-Calderon*, 765 F.2d at 1351).

The *Griffin* court does not appear to have distinguished between the *Korwek* line of cases where denial of tolling followed a decision rejecting the class action itself and the situation where no court has yet determined that the class action is inappropriate. Indeed, in *Korwek*, the court itself distinguished the situation before it and a situation more similar to this one, explicitly "leav[ing] for another day the question of whether the filing of a potentially proper subclass would be entitled to tolling under *American Pipe*." *Korwek*, 827 F.2d at 879. Moreover, the *Griffin* panel's reasoning is inconsistent with our precedent in *Haas* where we approved *American Pipe* tolling for a subsequent representative's class claims after the original certified class representative was found wanting.[2]

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[2] Ironically, both Cutler and Andersen also cite for support *Catholic Social Services, Inc. v. INS*, 232 F.3d 1139 (9th Cir.2000) (en banc). In that case, the district court had properly certified a valid class. A panel of the Ninth Circuit concluded in 1998 that the class subsequently had been rendered invalid by the enactment of section 377 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). *Id.* at 1146. Rather than remanding to the district court to permit the plaintiffs to amend their complaint, that panel remanded for dismissal. *Id.* at 1146. After the district court had dismissed the case without prejudice, some plaintiffs whose claims were not affected by IIRIRA refiled their complaint and sought *American Pipe* tolling. The Ninth Circuit, in an en banc decision, observed that the plaintiffs had at all times "vigorously pursued this litigation," and distinguished both *Griffin* and the *Korwek* line because "[p]laintiffs in this case are not attempting to relitigate an

We return consequently to our decision in *Haas*. Although, as Andersen points out, *Haas* differs from this case in that the *Haas* district court had determined that its initial certification of a class was erroneous, we see no good reason why class claims should not be tolled where the district court had not yet reached the issue of the validity of the class. Andersen has not supplied any persuasive reason for making such a distinction.[3]

Andersen argues that judicial economy would be undermined if *American Pipe* tolling extends to class claims, because "class counsel would have little incentive to do any investigation of potential class representatives before filing suit. If the first representative was found to be inadequate, counsel could find another, and then another after that, and so on." Br. of Appellee Andersen at 31.

It is conceivable that if Cutler were to prove to be an inadequate representative, the same counsel who represents Berger and Cutler would seek to find another who is adequate. However, we are confident of the capacity of district courts to control abuse or ineptitude on the part of class counsel and to institute administrative procedures that would set deadlines for prospective class representatives while protecting the interests of unnamed plaintiffs.

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earlier denial of class certification, or to correct a procedural deficiency in an earlier would-be class." *Id.* at 1149. The court concluded that the plaintiffs could enjoy *American Pipe* tolling for their class claims. *Id.* The result in Catholic Social Services is essentially consistent with this court's decision in Haas.

[3] Because the District Court did not reach the issue of the propriety of a class action here, we need not consider whether *American Pipe* tolling would be available where the district courts abuse their discretion in denying certification of a class. *See, e.g., Gagnon*, 766 F.2d at 786-88 (vacating district court's order denying class certification for abuse of discretion and remanding for further proceedings).

We are, of course, like Andersen, concerned with judicial economy but we believe it need not be achieved at the expense of litigants for whom the *American Pipe* tolling rule was designed. As the Court stated,

> In cases such as this one, where the determination to disallow the class action was made upon considerations that may vary with such subtle factors as experience with prior similar litigation or the current status of a court's docket, a rule requiring successful anticipation of the determination of the viability of the class would breed needless duplication of motions.

American Pipe, 414 U.S. at 553-54, 94 S.Ct. 756.

In keeping with Supreme Court precedent and our own, we hold that the class claims of intervening class members are tolled if a district court declines to certify a class for reasons unrelated to the appropriateness of the substantive claims for certification. We will therefore remand so that the District Court may determine Cutler's status as a proper representative and, if he is not barred, may decide whether the case can be maintained as a class action.

IV.

Berger seeks to have us consider the District Court's dismissal of his individual Section 11 claims. He argues first that because the District Court dismissed his claims in the same order in which it denied class certification, we may address the dismissal of his claim under Rule 23(f)'s interlocutory appeal provision. Second, he argues that the appellees "have raised the issue in this appeal." Both arguments are without merit.

Rule 23(f) provides that "[a] court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule." FedR.Civ.P. 23(f). According to the Advisory Committee,

"Appeal from an order granting or denying class certification is permitted in the sole discretion of the court of appeals. No other type of Rule 23 order is covered by this provision." Fed.R.Civ.P. 23(f) advisory committee's notes. Berger's argument would have us stretch the limits of Rule 23(f) beyond Rule 23 certification questions. As quoted above, the Advisory Committee notes explicitly describe Rule 23(f) as not extending to any other type of order, even where that order has some impact on another portion of Rule 23.

Decisions of other circuits have also been scrupulous about limiting Rule 23(f) inquiries to class certification issues. *See, e.g., Bertulli v. Indep. Ass'n of Cont'l Pilots*, 242 F.3d 290, 294 (5th Cir.2001) (stating "under Rule 23(f), a party may appeal only the issue of class certification; no other issues may be raised," but consenting to review standing, an "inherent prerequisite to the class certification inquiry"); *Pickett v. Iowa Beef Processors*, 209 F.3d 1276, 1279 (11th Cir.2000) ("Rule 23(f) provides for our jurisdiction over interlocutory appeals from a district court's order granting class certification, and we limit our discussion to that issue. We do not address the merits of Plaintiffs' claims."); *see also Carter v. West Pub'g. Co.*, 225 F.3d 1258, 1262-63 (11th Cir.2000). Berger attempts to distinguish *Carter* by pointing out that in that case the appeals panel looked at two orders, one of which concerned the statute of limitations. But the statute of limitations inquiry in *Carter* was, as that court observed, a threshold inquiry into the class certification issue. That is not the case as to Berger's proposed class although, as this opinion notes, it is as to Cutler's proposed class.

We dispense quickly with Berger's second argument, that the appellees have somehow put Berger's Section 11 standing

into play. It is the limitation of Rule 23(f), not any arguments of the appellees, that determines our jurisdiction.[4]

V.

For the reasons heretofore set forth, we will dismiss Berger's appeal and vacate the District Court order denying certification of the class proposed by Cutler and remand on that issue as set forth in this opinion.

[4] The SEC filed an amicus curiae brief in this appeal stating its position that Section 11 is not limited to those who purchase in the offering but instead grants standing to all purchasers of registered securities. As we do not address the District Court's dismissal of Berger's individual Section 11 claims, we need not reach this issue.

APPENDIX B

UNITED STATES DISTRICT COURT
D. NEW JERSEY

Nos. 94-CV-5522, 96-CV-2318

MCKOWAN LOWE & CO., LTD.,
Plaintiff,

v.

JASMINE LTD., *et al.*,
Defendants,

HARRY BERGER, individually and on behalf of a class similarly situated, and BERNARD CUTLER, individually and on behalf of a class similarly situated,
Plaintiffs,

v.

JASMINE LTD., *et al.*,
Defendants.

June 30, 2000

OPINION

RODRIGUEZ, District Judge.

This matter is before the court on defendant Arthur Andersen LLP's motion for summary judgment on plaintiffs' claims against it brought pursuant to Section 11 of the Securities Act of 1933, 15 U.S.C. § 77k and Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and Rule 10b-5 promulgated thereunder, 17 C.F.R. § 240.10b-5, and on plaintiff Harry Berger's state law claims, and on plaintiff Harry Berger's motion to file a surreply in opposition to the summary judgment motion.

I. *BACKGROUND*

A. *The Parties*

Plaintiff Harry Berger is a resident of Winnetka, Illinois who purchased 2700 shares of Jasmine stock on January 11, 1994. Plaintiff Bernard Cutler is a resident of Cherry Hill, New Jersey who purchased 1000 shares of Jasmine stock on December 16, 1993 from Sands Brothers & Co., Ltd.

Defendant Jasmine, a Delaware corporation with its principal executive offices in Pennsauken, New Jersey, is an importer and supplier of women's footwear and handbags. Irving Mangel was its Chief Executive Officer, President, and Chairman of the Board. Samuel Mangel was its Vice President, Secretary, and Managing Director of Overseas Production and Sourcing. Melvin Twersky was the Managing Director of Sales and Marketing, Edward Maskaly the Managing Director of Finance and until March 1994, Chief Financial Officer, and Thomas Ciocco was the Treasurer and Controller.

Defendant Sands Brothers & Co., Ltd., is a licensed broker/dealer located in New York, New York. Although primarily engaged in investment banking, it functioned as the underwriter for the initial public offering of Jasmine's stock. Both defendants Martin Sands and Steven B. Sands are principals of the company and were named directors of Jasmine pursuant to the procedure detailed in the Prospectus for Sands Brothers & Co., Ltd. to nominate two designees to Jasmine's board subsequent to the initial public offering.

Defendant Arthur Andersen L.L.P. is an independent accounting/auditing firm headquartered in Chicago, Illinois. Andersen's Philadelphia, Pennsylvania office prepared audited financial statements in 1993 for use in the Prospectus provided in conjunction with the initial public offering of Jasmine's stock. Andersen's Report of Independent Public

Accountant dated November 22, 1993 was included in a Registration Statement containing a prospectus dated December 15, 1993.

Defendant McKowan Lowe, a Hong Kong corporation registered to conduct business in New Jersey, was Jasmine's exclusive purchasing agent in the Far East. Evelyn Wong, a citizen of Hong Kong, is McKowan's Chief Financial Officer. Tony Ngai, also a citizen of Hong Kong, is a Senior Director of the company.

B. *Facts*

1. *Nature of the Action*

This action stems out of the events surrounding the initial public offering of defendant Jasmine Ltd.'s ("Jasmine's") stock in December of 1993. According to the Amended Class Action Complaint, filed July 15, 1999, in order to achieve a successful initial public offering ("IPO"), the defendants caused or participated in the sale of shares of Jasmine pursuant to the Registration Statement and Prospectus which contained numerous misrepresentations and omissions of material fact. Additionally, plaintiffs allege that subsequent to the IPO, the defendants continued to make material misstatements and misrepresentations about the financial information which had been contained in the Registration Statement and Prospectus and about Jasmine's financial condition for the quarters ending December 31, 1993, March 31, 1994, and June 30, 1994, including in filings with the Securities and Exchange Commission ("SEC"). It is alleged that, as a result of defendants' wrongdoing, numerous shareholders like plaintiffs purchased now-worthless Jasmine stock at inflated prices.

2. *Events Leading to the IPO*

According to the Amended Class Action Complaint, during the period leading up to its IPO, Jasmine had become

insolvent.[1] Plaintiffs allege that the Jasmine and McKowan defendants engaged in various fraudulent activities which would allow the IPO to proceed.

Allegedly, at the time of the IPO, Jasmine owed McKowan approximately $15 million. In an attempt to make the prospectus more appealing and provide Jasmine with the funds necessary to pay off the debt, the parties, plaintiffs contend, attempted to conceal a large portion of this amount through fraudulent accounting practices.[2] Plaintiffs claim that false certifications were supplied to Andersen in the process of preparing the audited financial statements. Plaintiffs also claim that Andersen accepted the false certifications without confirming the actual debt owed by McKowan and without further inquiry. Thus, the financial statements did not reflect the actual amount owed to McKowan at the time the prospectus was issued.

Plaintiffs also allege that Jasmine falsely inflated its 1993 income though a sham sale to McKowan of an option to purchase Lucky Leader Trading Ltd. ("Lucky Leader"), an entity created and controlled by Jasmine as its purchasing

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[1] According to plaintiffs, Jasmine's long term debt was approximately $23 million, with approximately $15 million of that amount being owed to McKowan (and $8,750,000 being owed to Meridian Bank). Am. Class Action Compl. at ¶ 20. The existence and validity of this debt was the subject of the *McKowan v. Jasmine Ltd.* action. In addition, plaintiffs allege that Jasmine's earnings were virtually non-existent. *Id.* at ¶¶ 21, 22.

[2] Ultimately, plaintiffs allege that approximately $13 million of debt was transferred and concealed with a "side loan" created between McKowan and Jasmine for the same amount. Am. Class Action Compl. at ¶¶ 27-29. Consequently, at the time of the IPO, Jasmine's records reflected a debt to McKowan of only approximately $2.6 million. *Id.* at ¶ 30. Lujaco, Ltd., a Pennsylvania corporation with Irving M. Mangel as president and Samuel J. Mangel as secretary, allegedly assumed the obligation to repay the side loan in furtherance of the scheme, however, the parties, according to plaintiffs, acknowledged the true debt owed. *Id.* at ¶¶ 31-32.

agent in Asia. According to the Amended Class Action Complaint, the sale was through accounting entries only, as McKowan paid no money or other consideration. This paper transaction had the sole purpose, plaintiffs conclude, of allowing Jasmine to record an unrealized gain of approximately $1.16 million to make Jasmine appear profitable and allow the IPO to proceed.

Additionally, plaintiffs maintain that there were several material misrepresentations contained in the prospectus and 1993 financial statements, including Andersen's audit report and the extensive discussion of the information about Jasmine contained therein.

3. *Post IPO Misrepresentations*

After the IPO opened, Martin Sands made public statements about Jasmine's stock and its potential for success which allegedly contained misleading, unfounded, and false claims of future earnings and acquisitions. Plaintiffs claim that these statements were made because Sands Brothers, as underwriters and Jasmine directors, stood to profit handsomely if the venture was successful.[3]

In the meantime, plaintiffs contend that the Jasmine defendants continued their scheme to defraud by filing quarterly 10-Q reports with the Securities Exchange Commission which contained material misstatements and omissions. Plaintiffs further allege that Jasmine filed a false and misleading Form 8 K report, intentionally omitting the fact that Andersen, during its audit of the 1994 financial statements, withdrew after disagreements with Jasmine management which could have caused it to modify its previously unqualified 1993 audit report.[4]

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[3] At the time the statements were made and published, Sands had not revealed that Sands Brothers was the underwriter of Jasmine's IPO. However, a public retraction of the statements was made the next day.

[4] After Andersen withdrew as independent auditor, the accounting firm of BDO Seidman was retained by Jasmine to audit its 1994 financial

C. *Procedural History*

After Jasmine's stock became essentially valueless, plaintiff filed a complaint in the United States District Court for the Northern District of Illinois, alleging that the actions of the Jasmine defendants and Sands Brothers constituted violations of, among other things, federal and state securities fraud laws and the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq.* Upon plaintiff's motion, the case was transferred to this court on May 13, 1996. Soon thereafter, on June 10, 1996, plaintiff filed an Amended Complaint which added the McKowan defendants as parties.[5] A Second Amended Complaint was filed on November 18, 1996, adding Andersen as a defendant. The Third Amended Complaint, filed on April 22, 1997, added Fishbein as a defendant and raised additional claims against the Sands Brothers.

In lieu of answering the second amended complaint, the defendants filed their respective motions to dismiss. With these motions pending, both Andersen and the McKowan defendants applied for a stay of discovery under the Private Securities Litigation Reform Act of 1995, 15 U.S.C. § 77a *et seq.* In denying the stay of discovery, the Honorable Robert B. Kugler, U.S.M.J., determined that the Reform Act did not apply. That ruling was affirmed by this court on May 19, 1997.

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statements. According to the Amended Class Action Complaint, BDO Seidman also withdrew from the audit in March 1995 after discovering inconsistencies with Jasmine's representations, which were reported to the SEC. Am. Class Action Compl. at ¶¶ 57-63.

[5] On August 14, 1996, after the McKowan defendants were named as parties in *Berger,* the case was consolidated with *McKowan v. Jasmine Ltd.* McKowan voluntarily dismissed its case on February 19, 1999.

On May 8, 1997, plaintiff was granted leave to file a Third Amended Complaint, which was filed on May 16, 1997. Because the Third Amended Complaint had the potential of impacting defendants' various arguments in their motions to dismiss the Second Amended Complaint, and in anticipation of the filing of a Revised Third Amended Complaint, this Court dismissed all defendants' motions as moot on August 11, 1997. Defendants were given the opportunity to renew their motions against the Revised Third Amended Complaint, incorporating any of their previous submissions that remained applicable. They did so, and on December 1, 1997, this Court granted in part and denied in part these motions.

In the December 1, 1997 Order, this Court read *Shapiro v. UJB Financial Corp.*, 964 F.2d 272, 286 (3d Cir.), *cert. denied,* 506 U.S. 934, 113 S.Ct. 365, 121 L.Ed.2d 278 (1992), as interpreting the provision in Section 11 of the Securities Act of 1933 ("1933 Act"), 15 U.S.C. § 77k, that "any person acquiring a security issued pursuant to a false or misleading registration statement may recover damages", to mean that a plaintiff need not have purchased stock during the IPO, but that a plaintiff merely must prove that his purchased shares "are traceable to a false or misleading registration statement." The Court stated:

> Reliance on the registration statement is not necessary if the stock is purchased less than twelve months after the effective date.[6] 15 U.S.C. § 77k(a). If, however, the shares were purchased in the secondary market, "it would not be linked to a registration statement filed during the class period and the § 11 claim would fail." *Shapiro*, 964 F.2d at 286.
>
> Here, Jasmine's IPO was filed with the SEC on December 15, 1993. After the IPO was closed on

[6] Accordingly, the various defendants' motion for dismissal based upon plaintiff's failure to allege actual reliance for the § 11 claim is without merit.

December 22, 1993, Sands Brothers exercised an option to purchase an additional 250,000 overalloted shares on January 7, 1994. Third Am. Compl. at Ex. B, p. 5 (10-Q Report for period ending Dec. 31, 1993). Plaintiff claims to have purchased his shares, pursuant to the registration statement and prospectus, directly from Sands Brothers on January 11, 1994. Therefore, it is possible that plaintiff can prove that these shares were not purchased in the secondary market and can be traced to those issued pursuant to the IPO.[7] *Shapiro*, 964 F.2d at 286.

Furthermore, the requirement that the shares be "traceable" to the registration statement would be meaningless if § 11 was applied only to the limited window of the IPO. Plaintiff purchased the stock less than three weeks after the IPO officially closed. Section 11 liability is narrowly focused on the registration statement. Since this purchase was so close in time to the original issuance of stock, it seems unlikely that indicators other than the registration statement, such as quarterly financial reports for example, could have been disseminated and relied on in plaintiff's decision to purchase. "Because we cannot say that plaintiffs can prove no set of facts that would entitle them to relief, the § 11 claim cannot be dismissed at this time." *Id.*

December 1, 1997 Order, pp. 9-10.

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[7] This scenario is distinguishable from *Gannon v. Continental Ins. Co.*, 920 F.Supp. 566 (D.N.J.1996). In *Gannon,* the plaintiff purchased shares of his employer's corporate parent's stock through incentive savings plan on the "open market." *Id.* at 575. The court concluded that this, by definition, was not pursuant to an initial public offering, and thus held that plaintiff failed to state a claim under either 15 U.S.C. § 77k, or 15 U.S.C. § 77l. *Id.* In contrast, the plaintiff in the present case alleges that his shares were purchased pursuant to the initial public offering. In light of the foregoing discussion, *Gannon* can not be construed to hold that plaintiff must plead that the stock was purchased during the limited time frame of the IPO just to state a claim upon which relief may be granted.

The Court dismissed the claim against Andersen for liability under Section 15, finding that Andersen was not a "controlling person" under that section. It held, however, that the McKowan defendants could be "controlling persons" and therefore could be sued under Section 15. The Court then dismissed plaintiff's conspiracy liability claims against the Jasmine and McKowan defendants.

Regarding the statute of limitations, the Court found:

> An action under § 11 of the 1933 Act must be brought "within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence. . . ." 15 U.S.C. § 77m; *In re Data Access Systems Securities Litigation,* 843 F.2d 1537, 1550 (3d Cir.), *cert. denied,* 488 U.S. 849, 109 S.Ct. 131, 102 L.Ed.2d 103 (1988). Because § 15 control person liability is derivative of § 11 liability, the same limitations period applies. *Wiley [v. Hughes Capital Corp.],* 746 F.Supp. [1264,] 1277 [(D.N.J.1990)]; *Insurance Consultants of America, Inc. v. Southeastern Insurance Group, Inc.,* 746 F.Supp. 390, 404 (D.N.J.1990). Moreover, "[t]he statute of limitations of section [11] of the 1933 Act runs not from 'the time at which a plaintiff becomes aware of all of the various aspects of the alleged fraud, but rather [from] the time at which plaintiff *should* have discovered the general fraudulent scheme.'" *Insurance Consultants,* 746 F.Supp. at 405 (emphasis in original) (quoting *Berry Petroleum Co. v. Adams & Peck,* 518 F.2d 402, 410 (2d Cir.1975)). As one court in this circuit explained:
>
> > Whether plaintiffs should have known of their claims in the exercise of reasonable diligence requires consideration of several elements. First, plaintiffs must have sufficient information of possible wrongdoing to place them on "inquiry notice" or to excite "storm warnings" of culpable activity. Once on

> inquiry notice, plaintiffs have a duty to exercise reasonable diligence to uncover the basis for their claims and are held to have constructive notice of all facts they could have learned through diligent investigation during the limitations period.

Gruber v. Price Waterhouse, 697 F.Supp. 859, 864 (E.D.Pa.1988) (footnote and citations omitted), *aff'd*, 911 F.2d 960 (3d Cir.1990); *see also Elysian Federal Savings Bank v. First Interregional Equity Corp.*, 713 F.Supp. 737, 745-46 (D.N.J.1989) (citing *Gruber*).

Plaintiff contends that his complaint was filed within one year of the date of inquiry notice. The initial complaint was filed on November 17, 1995. Defendants claim that plaintiff received adequate notice as early as the registration statement and prospectus were filed with the SEC on December 15, 1993, because the cover page stated Jasmine was a very high-risk stock. . . . Further, defendants contend that other indicators—such as a drop in price of Jasmine stock in light of representations that it would produce a high return—put plaintiff on inquiry notice.

Viewing the allegations in the Revised Third Amended Complaint in the light most favorable to the non-moving party, plaintiff was first given inquiry notice in the May 19, 1995 form 8-K which disclosed irregularities discovered by BDO Seidman, who succeeded Andersen and shortly thereafter terminated its relationship with Jasmine. Revised Third Am. Compl. at Ex. N. It cannot be said that the warnings in the prospectus by themselves created notice because they did not contradict oral representations made prior to purchase of the stock.[8] *See Insurance Consultants*,

[8] Indeed, the prospectus did not contain any warnings that the financial status of Jasmine which was certified by Andersen contained misrepresentations and omissions of material facts.

> 746 F.Supp. at 406 (holding inquiry notice present where oral representation made prior to purchase contradict written representations in offering memoranda). Furthermore, as defendants strenuously point out, Jasmine did experience losses, and these economic conditions were reported in its 10-Q forms as early as February 14, 1994. However, throughout this period, Andersen, one of the "big six" accounting firms, did not adjust its position which approved of Jasmine's financial statements and economic viability. Additionally, the December 19, 1994 8-K form, while it revealed Andersen withdrew as Jasmine's accountant, did not reveal any discrepancies or irregularities in Jasmine's previous financial statements. Andersen's withdrawal was reported as a "mutual" parting, which does not necessarily infer any potential illicit conduct, and in the context of this motion to dismiss, should not have instinctively "excite[d] 'storm warnings' of culpable activity." *Gruber*, 697 F.Supp. at 864. Therefore, all defendants' motions to dismiss on the basis of the statute of limitations are denied.

December 1, 1997 Order, pp. 15-18.

The Court continued with the statute of limitations issue as applied to actions brought under § 10(b) of the Securities Exchange Act of 1934 ("1934 Act"), 15 U.S.C. § 78j(b), and Securities and Exchange Commission Rule 10b-5 ("Rule 10b-5"), 17 C.F.R. § 240.10b-5, finding that "the same limitations period applies as with claims brought under § 11 of the 1933 Act" and citing for support *Rolo v. City Investing Co. Liquidating Trust,* 845 F.Supp. 182, 243-44 (D.N.J. 1993)[9] ("Accordingly, to have a timely securities fraud

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[9] *Rolo* was vacated on April 4, 1995 to be reconsidered in light of the Third Circuit's decision in *Jaguar Cars, Inc. v. Royal Oaks Motor Car Company, Inc.*, 46 F.3d 258 (3d Cir.1995); *see Rolo v. City Investing Company Liquidating Trust*, 66 F.3d 312 (3rd Cir.1995). On remand, the

claim, plaintiffs here need to allege that (1) they did not know and should not have known that they had a claim for a violation of the securities laws earlier than . . . one year before the commencement of this action . . . and (2) more than three years had not passed since the violation itself."). Thus, the Court denied dismissal of the § 10(b) claims for the same reasons it denied dismissal of the § 11 claims. December 1, 1997 Order, pp. 20-21.

The Court also declined to dismiss the § 10(b) claim against Andersen on the ground that plaintiff did not properly plead the scienter requirement. The Court found that scienter may also include reckless behavior which the plaintiff sufficiently pled on Andersen's part. Similarly, the Court declined to dismiss the § 10(b) claim on the ground that the Third Circuit had not answered the question of whether the fraud on the market presumption of reliance applies in a case of newly issued stock because the plaintiff sufficiently alleged reliance on the misstatements and omissions in the prospectus and registration statement to get past the motion to dismiss.

The Court did dismiss plaintiff's federal RICO and RICO conspiracy claims, but allowed the New Jersey RICO claim to proceed. The New Jersey securities fraud claim, and the Illinois securities fraud claim against all but the McKowan defendants also withstood the motion to dismiss. The Court also found that plaintiff stated a claim under the Illinois Consumer Fraud Act and claims for common law fraud and negligent misrepresentation under New Jersey law and under Illinois law against only Sands Brothers and Andersen.

On August 6, 1998, the Court denied plaintiff Harry Berger's motion for class certification of "a class consisting

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district court held that *Jaguar Cars* did not affect its prior holding regarding the securities fraud claims. 897 F.Supp. 826, 833 (D.N.J.1995), *aff'd* 155 F.3d 644 (3d Cir.1998).

of all purchasers of publically-traded securities of Jasmine, Ltd. who purchased during the period from December 15, 1993 through and including June 20, 1995." Although the Court found the putative class to be sufficiently numerous and found that the commonality requirement in itself did not pose a problem, the Court found Berger to be an atypical class representative. The Opinion stated,

> Indeed, this is not a run-of-the-mill securities fraud case. Plaintiff did not purchase during the limited window of the IPO, but from an over-allotment of shares approximately three weeks after the close of the IPO. Moreover, as Plaintiff testified in his deposition, he relied solely on the oral representations of his broker (an employee of Defendant Sands Brothers & Co., Ltd. who was also the underwriter of the IPO) and without even seeing the Prospectus beforehand. . . . Thus, his reliance on this prospectus or other related documents such as the audit reports and the advice of Plaintiff's broker who was also an insider to the IPO, will be proved differently for Plaintiff than for those class members who may have only seen the prospectus (and/or other documents prepared by some of the named defendants) before purchasing the stock. The time of the purchase of the stock—whether it was purchased during the IPO or the short time frame following the IPO when Plaintiff purchased his shares—causes additional differences in proving each class members' case, possibly even affecting Plaintiff's standing to sue under Section 11. When considering these facts and the many permutations of proving reliance against the many defendants, in addition to the differing factual circumstances, it becomes evident that Plaintiff's claims and their anticipated

> methods of proof would not be typical of the class he seeks to represent and he has therefore not met the requirement of typicality.[10]

August 6, 1998 Order, pp. 7-9. The Court also questioned the adequacy of representation because plaintiff Berger seemed to know very little about the factual predicate of the lawsuit and about his duties as a class representative. On March 9, 1999, this Court denied plaintiff Berger's motion for reconsideration of the denial of class certification. On May 24, 1999, the United States Court of Appeals for the Third Circuit denied plaintiff's petition for leave to file an interlocutory appeal from the Order denying class certification.

On June 29, 1999, the Honorable Robert B. Kugler, U.S.M.J., granted plaintiff's September 9, 1998 motion to have Bernard L. Cutler intervene as a plaintiff and allowed for an amendment to the complaint in order to do so. In the Amended Class Action Complaint, filed July 15, 1999, plaintiffs again name as class members "all persons other than defendants who purchased shares of Jasmine stock between December 15, 1993, and June 20, 1995 inclusive (the "Class Period")."

On July 16, 1999, Andersen filed a motion to dismiss the Complaint for lack of subject matter jurisdiction, which was joined in by several other defendants, but which was denied by this Court on September 23, 1999.

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[10] In this respect, this case is different from cases such as *Eisenberg v. Gagnon*, 766 F.2d 770, 786 (3d Cir.), *cert. denied sub nom. Weinstein v. Eisenberg*, 474 U.S. 946, 106 S.Ct. 342, 88 L.Ed.2d 290 (1985). The shortcomings in meeting the typicality requirement in the instant case are not solely based on individual issues of reliance, but on the many unique circumstances that will undoubtedly create "significant variations in the proofs of class members." *See Lerch v. Citizens First Bancorp, Inc.*, 144 F.R.D. 247, 257 (D.N.J.1992).

Also on September 23, 1999, this Court denied plaintiffs' motion to certify a settlement class and preliminarily approve a settlement agreement between plaintiffs and Fishbein & Company, P.C. The Court found that because of Cutler's relationship, through his son-in-law, with Sam Mangel, Cutler brought certain encumbrances to the case not typical of the class members he sought to represent. His reliance on the Prospectus and on the advice of Sands Brothers, rather than on the advice of a Jasmine insider, may have had to be proved differently from other class members. Finally, "[e]ven if he did not rely on any information provided by a Jasmine insider, the Court [saw] that because of his relationships, he will be subject to attacks that other class members would not be." September 23, 1999 Order, p. 11. Quoting Andersen's opposition brief, the Court continued, "The very existence of th[e] issue of Mr. Cutler's [possible] reliance on nonpublic information renders him an atypical and inadequate representative because it would be distracting to focus class resources on these issues to the detriment of a putative class." *Id.* at p. 12. Moreover, Cutler did not meet his burden of showing that his status as a so-called "insider" actually was typical of the class of investors he sought to represent.

On November 12, 1999, Andersen filed the instant motion for summary judgment. On February 1, 2000 plaintiff Berger filed a motion for leave to file a surreply to the motion for summary judgment.

On February 2, 2000, plaintiff Cutler filed a motion for class certification on behalf of all purchasers, other than the defendants, of publicly-traded securities of Jasmine, Ltd. who purchased during the period from December 15, 1993 through and including June 20, 1995. In this newest motion, Cutler asks this Court to certify a class for those claims in Count One and Count Fourteen which were not before the Court in the motion for preliminary approval of the Fishbein settlement and where reliance is not an element. Thus, Cutler

seeks certification of his claims under Sections 11 and 12(2) of the Securities Act of 1933, 15 U.S.C. §§ 77k and 77*l*(2), arguing that any relationships he may have had with Jasmine insiders are irrelevant to these claims which do not require a showing of reliance.

II. *DISCUSSION*

A. *Andersen's Motion for Summary Judgment*

Arthur Andersen has moved for summary judgment on both the proposed class and the individual federal securities claims of plaintiff Cutler, arguing that those claims are time-barred by the applicable limitations period, which Arthur Andersen asserts was not tolled during the pendency of plaintiff Berger's proposed class action. In addition, Arthur Andersen argues that plaintiff Berger's federal securities law claims also are time-barred, and that, in any event, Berger cannot prove the elements essential to those claims.

1. *Summary Judgment Standard*

The entry of summary judgment is appropriate only when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). An issue is "genuine" if it is supported by evidence such that a reasonable jury could return a verdict in the non-moving party's favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A fact is "material" if, under the governing substantive law, a dispute about it might affect the outcome of the suit. *Id.* In determining whether a genuine issue of material fact exists, the court must view the facts and all reasonable inferences drawn from those facts in the light most favorable to the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

The moving party has the initial burden of demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Once the moving party has met its opening burden, the non-moving party must identify, by affidavits or otherwise, specific facts showing that there is a genuine issue for trial. *Id.* at 324, 106 S.Ct. 2548. The non-moving party may not rest upon the mere allegations or denials of its pleading. *Id.; Maidenbaum v. Bally's Park Place, Inc.*, 870 F.Supp. 1254, 1258 (D.N.J.1994), *aff'd* 67 F.3d 291 (3d Cir.1995). "[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322, 106 S.Ct. 2548.

However, in deciding the motion, the court does not "weigh the evidence and determine the truth of the matter, but [instead] determine[s] whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 248, 106 S.Ct. 2505. If the non-movant has provided evidence exceeding the "mere scintilla" threshold in demonstrating a genuine issue of material fact, the court cannot weigh the evidence and credit the movant's interpretation of the evidence. This is so even if the movant's evidence far outweighs the non-movant's evidence. Credibility determinations are the province of the factfinder. *Big Apple BMW, Inc. v. BMW of North America, Inc.*, 974 F.2d 1358, 1363 (3d Cir.1992), *cert. denied*, 507 U.S. 912, 113 S.Ct. 1262, 122 L.Ed.2d 659 (1993).

2. *Motion as Against Cutler's Claims*

i. Andersen argues that Cutler's proposed class claims are time-barred because equitable tolling does not apply.

The controlling statute of limitations for a Section 11 claim is found in the Securities Act of 1933, and is one year from the time the plaintiff discovered or, after the exercise of

reasonable diligence, should have discovered the untrue statements or omissions, but in no event shall the action be brought more than three years after the security was bona fide offered to the public. 15 U.S.C. § 77m. Thus, the Court must determine for a section 11 claim whether and when the plaintiff was under inquiry notice.

The "proper period of limitations for a complaint charging violation of section 10(b) and Rule 10b-5 is one year after the plaintiff discovers the facts constituting the violation, and in no event more than three years after such violation." *In re Data Access Sys. Sec. Litig.*, 843 F.2d 1537, 1550 (3d Cir.) (in banc), *cert. denied,* 488 U.S. 849, 109 S.Ct. 131, 102 L.Ed.2d 103 (1988). This period of limitations comes from the Securities Exchange Act of 1934 which does not provide for inquiry notice. *Id.*

In this case, Jasmine's registration statement and prospectus were filed with the SEC on December 15, 1993. The initial Complaint was filed on November 17, 1995. Plaintiffs have argued that they did not receive notice of their claims until May of 1995, and when this case was in the procedural stance of a motion to dismiss, this Court found that plaintiff Berger was first given inquiry notice in the May 19, 1995 form 8 K which disclosed irregularities discovered by BDO Seidman, who succeeded Andersen and shortly thereafter terminated its relationship with Jasmine. Revised Third Am. Compl. at Ex. N. On August 6, 1998, this Court denied plaintiff Berger's motion for class certification. On September 8, 1998, plaintiff Cutler filed his motion to intervene. Thus, absent tolling, Cutler's federal securities claims would be time-barred.

For purposes of this portion of its motion, Andersen assumes that notice of the claims did not occur until May of 1995. Andersen's argument is that the pendency of a class action tolls the limitations period for class members' *individual* claims, but not for additional class action claims by

putative members of the original asserted class. Cutler argues that the filing of a class action tolls the running of *any* applicable limitations period for all persons in the putative class; once certification is denied, the period begins to run again. Cutler states that the potential for abuse is in raising new claims, not in perpetuating the rights of putative class members.

The United States Supreme Court has held that "the commencement of an original class suit tolls the running of the statute for all purported members of the class who make timely motions to intervene after the court has found the suit inappropriate for class action status." *American Pipe and Const. Co. v. Utah*, 414 U.S. 538, 553, 94 S.Ct. 756, 38 L.Ed.2d 713 (1974). The Court reasoned that a federal class action serves a purpose of efficiency and economy of litigation and is "a truly representative suit designed to avoid, rather than encourage, unnecessary filing of repetitious papers and motions." *Id.* at 550, 94 S.Ct. 756. The Court also has stated that such a tolling rule for class actions is not inconsistent with the purposes served by statutes of limitations: putting defendants on notice of adverse claims and preventing plaintiffs from sleeping on their rights. *Crown, Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345, 352-53, 103 S.Ct. 2392, 76 L.Ed.2d 628 (1983) ("Tolling the statute of limitations thus creates no potential for unfair surprise, regardless of the method class members choose to enforce their rights upon denial of class certification."). The clock begins to run anew when the district court denies certification. *In re Westinghouse Sec. Litig.*, 982 F.Supp. 1031, 1033 (W.D.Pa.1997) (citing *American Pipe*, 414 U.S. at 561, 94 S.Ct. 756).

American Pipe and its progeny have made clear that the pendency of a previously filed class action tolls the limitations period for a proposed class member's subsequent individual actions. However, neither the United States

Supreme Court nor the Third Circuit has decided whether the *American Pipe* tolling rule applies, after a denial of class certification, to class claims brought by a new class representative. The vast majority of the circuits which have examined this issue have declined to expand the *American Pipe* rule beyond individual claims to allow tolling for subsequent class actions. *See, e.g., Basch v.Ground Round, Inc.*, 139 F.3d 6, 10-11 (1st Cir.), *cert. denied*, 525 U.S. 870, 119 S.Ct. 165, 142 L.Ed.2d 135 (1998) ("Plaintiffs may not stack one class action on top of another and continue to toll the statute of limitations indefinitely. Permitting such tactics would allow lawyers to file successive putative class actions with the hope of attracting more potential plaintiffs and perpetually tolling the statute of limitations as to all such potential litigants, regardless of how many times a court declines to certify the class."); *Griffin v. Singletary,* 17 F.3d 356, 359-60 (11th Cir.1994), *cert. denied sub nom., Florida v. Platt,* 513 U.S. 1077, 115 S.Ct. 723, 130 L.Ed.2d 628 (1995) ("[P]laintiffs may not piggyback one class action onto another, and thereby engage in endless rounds of litigation . . . over the adequacy of successive named plaintiffs to serve as class representatives." (Internal quotations omitted.)); *Andrews v. Orr,* 851 F.2d 146, 149 (6th Cir.1988) ("The courts of appeals that have dealt with the issue appear to be in unanimous agreement that the pendency of a previously filed class action does not toll the limitations period for additional class actions by putative members of the original asserted class."); *Korwek v. Hunt,* 827 F.2d 874, 879 (2d Cir.1987) ("[T]he tolling rule established by *American Pipe*, and expanded upon by *Crown, Cork*, was not intended to be applied to suspend the running of statutes of limitations for class action suits filed after a definitive determination of class certification; such an application of the rule would be inimical to the purposes behind statutes of limitations and the class action procedure."); *Robbin v. Fluor Corp.,* 835 F.2d 213, 214 (9tn Cir.1987) ("'*American Pipe* and *Crown, Cork*

represent a careful balancing of the interest of plaintiffs, defendants, and the court system.' . . . We agree with the Second Circuit that to extend tolling to class actions 'tests the outer limits of the American Pipe doctrine and . . . falls beyond its carefully crafted parameters into the range of abusive options.'" (Quoting *Korwek* at 879.)); *Salazar-Calderon v. Presidio Valley Farmers Ass'n*, 765 F.2d 1334, 1351 (5th Cir.1985), *cert. denied,* 475 U.S. 1035, 106 S.Ct. 1245, 89 L.Ed.2d 353 (1986) ("Plaintiffs have no authority for their contention that putative class members may piggyback one class action onto another and thus toll the statute of limitations indefinitely, nor have we found any. To the contrary, it has repeatedly been noted that 'the tolling rule [in class actions] is a generous one, inviting abuse,'" (Quoting *American Pipe* concurrence.)). Indeed, the general rule is that once class certification has been denied, the pendency of the previously filed class action does not toll the limitations period for later class actions by putative members of the originally asserted class.

In this case, plaintiff Cutler is attempting to certify a class which has already been denied certification by this Court. Thus, a decision on the appropriateness of proceeding as a class has been decided, and Cutler should not be able to force this Court to "engage in endless rounds of litigation over the adequacy or propriety of proceeding as a class." *Griffin*, 17 F.3d at 359. In addition, it is of no moment that Cutler has intervened as a plaintiff and attempted to assert class claims, rather than having filed a separate suit alleging his class causes of action. *See Fleming v. Bank of Boston Corp.*, 127 F.R.D. 30, 36 (D.Mass.1989) (finding it impermissible to use intervention after certification has been denied "to circumvent the statute of limitation by filing a lawsuit without an appropriate plaintiff and then searching for one who can later intervene with the benefit of the tolling rule."). In a case on all fours with the procedural posture of this case, albeit from another district, the court found "too formalistic" plaintiffs'

attempt at distinguishing their case from those outlined above by arguing that the filing of a subsequent complaint is different from the addition of the proposed class representative through amendment to the original complaint. *Fleck v. Cablevision VII, Inc.*, 807 F.Supp. 824, 827 (D.D.C.1992) ("The potential for abuse is the same whichever procedure is used to renew the motion for class certification through the use of a new class representative.").

This Court finds persuasive the rationale discussed within these cases and finds the cases cited by plaintiffs distinguishable in that none of them treated with a case after certification was denied in the first instance. *See, e.g., Goodman v. Lukens Steel Co.*, 777 F.2d 113 (3d Cir.1985), *judgment aff'd*, 482 U.S. 656, 107 S.Ct. 2617, 96 L.Ed.2d 572 (1987) (After district court certified class[11] and tried case, court of appeals found that no named plaintiff adequately represented class for a particular claim. To "salvage" the work of the district court and counsel, appellate court instructed district court to explore the possibility of intervention by qualified class representatives.); *Haas v. Pittsburgh Nat'l Bank*, 526 F.2d 1083, 1097 (3d Cir.1975) (Court applied tolling to allow the amendment of additional class members after an initial grant of class action status had the effect of vesting "the class with a legal status separate from the interest asserted by the nominal plaintiffs."); *Trief v. Dun & Bradstreet*, 144 F.R.D. 193 (S.D.N.Y.1992) (Defendant conceded that the case was appropriate for certification, but contended the named plaintiffs were not adequate. Before the court decided the class certification motion, so with no danger of relitigating decided issues, plaintiffs filed a motion for an "adequate" person to intervene as plaintiff.).

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[11] After the court initially certifies a class, persons may have relied on the pendency of the already certified class action to protect their interests, rather than opting out of the class. Where no class was ever certified, reasonable reliance is not an issue.

The Court does recognize that two district courts in California and one in Washington, D.C. reached contrary decisions in unreported cases, *In re Quarterdeck Office Systems, Inc. Sec. Litig.*, 1994 WL 374452 (C.D.Cal.1994) and *Shields v. Smith*, 1992 WL 295179 (N.D.Cal.1992); *Shields v. Washington Bancorporation*, 1992 WL 88004 (D.D.C.1992). These cases distinguish the great weight of authority by stating that all of the cases in which the courts held that the statute was not tolled for later class actions involved either an attempt to file an entirely separate class action lawsuit after the dismissal of an earlier action or an attempt to bring a later action after the court had determined that proceeding as a class action was an inappropriate method of resolving the lawsuit [12], as opposed to allowing an intervening plaintiff, in an attempt to find a more appropriate class representative, to perpetuate the class action. Absent controlling authority to the contrary, however, this Court opts to follow the reasoning established by the circuit courts, as set forth above.

The only other court within this circuit to have addressed this issue came to the same conclusion as this Court:

> [A] contrary rule would allow the attorney for a class to revive the class claims upon denial of certification by simply refiling a new class action using a different putative class member as representative. The attorney would be able to bring a potentially endless succession

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[12] Despite its previous opinion that the case seems to satisfy the numerosity requirement, this Court questions, in light of the record now before it, whether the instant case is even appropriate for class action treatment. After class certification was denied, plaintiffs' attorneys sent an "advertisement" to potential class members, and apparently the best (if not the only) response received was that of Bernard Cutler. Thus, perhaps the number of parties in the proposed class is not as great as had originally been represented to the Court, such that any interested parties could have intervened or pursued individual lawsuits without burdening the courts.

> of class actions, each tolling the [statute of limitations] for its successor. Such a rule would frustrate the principal purpose of the class action procedure—promotion of efficiency and economy of litigation.

In re Westinghouse Sec. Litig., 982 F.Supp. 1031, 1034 (W.D.Pa.1997) (quoting *Smith v. Flagship Int'l*, 609 F.Supp. 58, 64 (N.D.Tex.1985)). It is not difficult to envision this type of "slippery slope" simply serving as a vehicle for attorneys to abuse the *American Pipe* rule.

Although the defendants have been on notice of the claims asserted, because this Court does not definitively believe that class action treatment in this case would be the most efficient manner of resolution for all parties concerned, it finds that the statute of limitations was not tolled for Cutler's class claims. Even assuming that the statute did not begin to run for each of the federal securities claims until May of 1995, Cutler's attempt to assert these claims in September of 1998, more than one year after they arose, was untimely. Accordingly, summary judgment will be granted on Cutler's federal securities class claims.

ii. Andersen argues that Cutler's individual federal securities claims, based on the theory that Andersen's 1993 Audit Report (included in the Prospectus) was not correct, are time-barred.

Andersen argues that Cutler's deposition testimony, confirmed by testimony of Robert Bonaventura of Sands Brothers, establishes that Cutler was on actual notice, in that he believed he had been defrauded with respect to the Jasmine investment, by Spring of 1994. Therefore, according to Andersen, the statute of limitations ran by the Spring of 1995 but Berger's suit was not filed until November of that year. On the other hand, plaintiffs argue that this Court already found that plaintiffs' noticing Jasmine's poor performance did not constitute inquiry notice, especially when

Andersen also did not see any indications of fraud. Plaintiffs also argue that Andersen presents a skewed version of the testimony, which is subject to conflicting interpretations and therefore must be resolved in favor of the non-movant. In addition, regarding any conflicts or changes in Cutler's deposition testimony between the first and second day of depositions, plaintiffs argue that the law in the Third Circuit precludes summary judgment.

At the outset, the Court notes that Andersen has conceded that the *American Pipe* rule tolled Cutler's individual claims during the pendency of Berger's case. Thus, from November 17, 1995 until August 6, 1998 when class certification was denied, the statute of limitations was tolled. The Court also notes that it ruled on a motion to dismiss that plaintiff Berger was first given inquiry notice in the May 19, 1995 form 8-K which disclosed irregularities discovered by BDO Seidman, and that warnings in the prospectus by themselves did not create notice "because they did not contradict oral representations made prior to purchase of the stock.[13] *See Insurance Consultants*, 746 F.Supp. at 406 (holding inquiry notice present where oral representation made prior to purchase contradict written representations in offering memoranda)." December 1, 1997 Order, p. 15.

Now that the case is at the summary judgment stage, Andersen cites to Cutler's deposition testimony. A review of the entirety of his testimony leaves the Court with the impression that Cutler became concerned when the price of Jasmine stock went from the $5.50 per share that he paid down to $2 per share. Exhibit A of Andersen's Appendix, Part II reveals that the price of the stock first closed at $2 on June 23, 1994, although it traded at $2 at some point during

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[13] Indeed, the prospectus did not contain any warnings that the financial status of Jasmine which was certified by Andersen contained misrepresentations and omissions of material facts.

the trading day a month before. It closed at $1.75 on July 8, 1994, but went up to close at 3-7/8 on September 15, 1994 before it declined again to close at $1 beginning December 5, 1994, then hovered in the area of $1 until February and March of 1995 when the stock fairly consistently closed below $1.

The first day of his testimony, Cutler made clear that the initial drop in the stock price did not lead him to believe that the Jasmine prospectus figures were not correct, but when the stock continued to go down, and after he spoke with some people, and certainly after he had received the August 24, 1998 letter from Futterman and Howard, he suspected that the facts presented to him relative to Jasmine were incorrect. Two weeks later, at the second day of his deposition, Cutler testified that he may have felt "gypped" when the stock went down to $2, as if he had made a bad investment, but he always felt "it would come back" because "everything else seemed to be alright" and Sands Brothers did not seem troubled by the declining price. He did admit when led by counsel's question, that the question of whether he had been cheated in his investment in Jasmine, or induced in some way to invest, may have gone through his mind in late Spring of 1994. He also testified, in the end, that he did not feel he had been "cheated" (as opposed to "gypped") until the stock stopped trading in June of 1995.[14] He did not suspect that the

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[14] Plaintiffs' attorneys characterize the 1994 time frame discussed in the first deposition as a "guess", and state that this was understandable given Cutler's age of seventy-six years and the fact that the deposition occurred over four years after the time period in question. During his second deposition, Cutler attempted to clarify the date, stating that he may have been confused because Jasmine had not been his only stock purchase. Where a witness was confused at an earlier deposition or for some other reason misspoke, a subsequent correcting or clarifying deposition or affidavit may be sufficient to create a material dispute of fact. *Joseph v. Hess Oil*, 867 F.2d 179, 183 (3d Cir.1989) (citing *Martin v. Merrell Dow Pharmaceuticals, Inc.*, 851 F.2d 703, 705 (3d Cir.1988)).

information presented in the prospectus about Jasmine's financial condition was not truthful until that time.

Relevant portions of each deposition follow, along with excerpts from the deposition of Bonaventura, a Managing Director and Stockbroker at Sands Brothers.

Q. Mr. Cutler, when you received this August 24, 1998 letter from Futterman and Howard, had you heard of Futterman and Howard before?

A. No.

Q. What did you do when you received this letter in the mail?

A. I was very interested in it and contacted the firm.

Q. Why were you very interested in it?

A. I don't like to lose money under peculiar circumstances.

Q. Can you tell us what you mean by peculiar circumstances?

A. I feel I was jipped [sic throughout transcript].

Q. Why do you feel that you were jipped?

A. Because the facts that were presented to me relative to Jasmine were very definitely incorrect.

Q. What facts are you talking about that you believe were represented to you relative to Jasmine?

A. Everything I read in the prospectus, except the flowery parts, and of course they always say there is a downfall, but when you read the figures, as I later found out, all the figures were wrong.

Q. When did you believe that you had been jipped, as you put it, in your investment?

A. When I saw the stock dropping. Not initially, but later on.

Q. Do you recall when it was that you saw the stock dropping?

A. Well, it came out December, so I would say the spring of the following year. That would be 1994.

Q. Do you recall that you bought the stock at $5.50 per share?

A. Right.

Q. And what happened to the best of your recollection to the stock price between the time you purchased the stock and the spring of 1994?

A. Well, there was an initial blip up and then thereafter it just started drifting down.

Q. Do you recall approximately how far down it drifted by the spring of 1994?

A. I think it was in the range of $2 to $3.

Q. And was it at that time that you felt that you had been jipped in your investment in Jasmine?

A. I believe so.

Q. Was it at that time that you thought there were peculiar circumstances with respect to your investment in Jasmine?

A. Yes.

Q. Was it the drop in the stock price that led you to believe that the figures in the prospectus were not correct?

A. Not necessarily the initial drop because that happens quite frequently. But it was the drop and later on discussions with people, mainly my son-in-law, who knows Sam Mangel.

. . . . . .

Well, like I said, the initial drop is something that happens quite often, but as it proceeded to go down, then the light went on.

Q. You mention that at some point the light went on. What did you mean by that?

A. I became aware that something was wrong.

Q. And to the best of your recollection when did that occur?

A. It's hard to say. Maybe late in the spring.

Q. Late in the spring of 1994?

A. Right.

(Cutler dep., April 14, 1999, pp. 46-49)

A. Well, they said it is a little low but it will be all right; it's only natural; give it time.

Q. Did you receive quarterly reports relating to Jasmine?

A. No.

Q. So you don't recall ever receiving Jasmine's first quarter Q10 report for the quarter ending December 31, 1993?

A. I don't think so.

Q. Do you recall receiving Jasmine's second quarter report for the quarter ending March 31, 1994?

A. I would say no.

Q. Did you ever try to sell any of your Jasmine stock?

A. No.

Q. Did you ever complain to anybody about your Jasmine investment?

A. Yes.

Q. To whom did you complain?

A. My son-in-law. I said it didn't look very good.

Q. Was that based on any other information that you had?

(Cutler dep., April 14, 1999, pp. 150-153)

A. Bought stock of company after reading prospectus which was not correct.

It says date filed January 5th '96.

Q. In 1996 what did you believe was not correct that the prospectus?

A. '96?

Q. Yes. When you filled out this form in 1996 what did you believe was not correct about the prospectus?

A. The information.

Q. What information are you referring to?

A. About the company.

Q. What information about the company?

A. Gross sales, net profit all the way down the line. . . . . All of it was wrong. . . . Well, accounts receivable, payable, the whole thing.

A. Because of the way this company went down. It went down so fast.

Q. So the rapid decline in the stock price of Jasmine lead you to believe that the information in the prospectus was not correct; is that fair?

A. Yes, because it was too good to go down like that.

. . . . . .

The prospectus stated earnings of about 40 cents and they didn't have earnings of 40 cents.

. . . . . .

Well, after speaking to probably someone at Sands I asked how much are they earning, and I asked what about the 49 cents on the prospectus, and he said no, that's not their earnings.

Q. When did you have your discussion with Sands regarding the 40 cents per share earnings?

A. Probably in one of my telephone calls.

Q. And when did that occur, sir?

A. In the spring of '94.

Q. Mr. Cutler, what were you told about Jasmine's earnings when you talked to Sands in the spring of 1994 and inquired about the 40 cents per share earnings?

A. I must have asked how much are they earning and the reply was below 40 cents if anything.

. . . Well, not from that. It's from later what happened to the stock, and then I recalled what their earnings were stated and how that wasn't the truth.

Q. And during those telephone conversations you inquired about Jasmine's current earnings at that time in 1994; is that true?

A. I must have, yes.

(Cutler dep., April 14, 1999, pp. 158-165)

A. Now on page six you see increasing sales, increasing gross profit, increasing operating income. Income before taxes, net income is very good as far as its increase. And then earnings per share 18 cents, 7 cents wasn't that good but 54 cents looked very good. It increases number of shares too. They still made more money. The ratio of assets liabilities is excellent.

Q. Are you referring to the balance sheet data on this page?

(Cutler dep., April 14, 1999, p. 207)

Q. By August 1994, you knew something was terribly wrong with the Jasmine stock, correct?

A. By terribly, what do you mean?

Q. Well, I think you—I don't want to repeat your prior testimony, but I think you testified by the late spring of 1994 you were—a light went on, to use your language.

A. I don't know if it was '94 now.

Q. Okay. Do you know at what price the stock was when you, the light went on?

A. I'd say around $2, $2 a share. . . . I said '94 but I think it's probably '95.

Q. Now you think it's spring of '95?

A. Right.

Q. But do you know what the stock price was in March and April 1994?

A. I'm not sure.

Q. Do we agree that the light went on when the stock price was around two, $3 a share?

A. Not three. Say two.

Q. Okay. If I told you that in May of 1994, the stock was at two and an eighth, would that refresh your recollection that, in fact, it was in 1994 that you were concerned?

A. Well, I was concerned but—

Q. And a light went on, correct?

MR. FUTTERMAN: Let him finish his answer, please.

A. I was concerned but I didn't think it warranted my doing anything. Everything else seemed to be all right. . . . In 1994, I just, I just figured there was something wrong with the stock, but I had hopes that it would come back. Everything else seemed to be all right. At Sands they didn't say anything was wrong.

(Cutler dep., April 29, 1999, pp. 59-64)

Q. Is it the case that you don't recall what year it was, but when the stock was going to $2 a share you knew something was wrong?

A. I probably have my time frames wrong because this isn't the only stock I've been buying and I have many more stocks to look at than this.

Q. Listen to my question, if you could. Isn't it a fact when this stock started going from 5.50 a share in December, when it hit two to $3 a share you became increasingly concerned, correct?

A. I became concerned.

Q. And you thought something was wrong?

A. Something was wrong with the stock, yes, because it was going down.

Q. And, in fact, you thought something was wrong with the company, correct, because it wasn't hitting .40 a share?

MR. FUTTERMAN: At what time are you talking about?

Q. Isn't it a fact that when the stock came down to about two to $3 a share you were concerned not only about the price of the stock but about your investment?

A. Yes, I became concerned.

Q. And, in fact—

A. If you're investing.

Q. And, in fact, you began to question whether or not the information provided in the prospectus was accurate?

MR. FUTTERMAN: Object to the form of the question. There's no testimony to that effect.

A. No. I was just concerned about the stock at its price. I didn't think about the other things at that time. I was just concerned about the stock.

Q. And didn't you, in fact, question yourself, not to someone else, didn't you question to yourself, by the late spring of 1994, whether the information in the prospectus was accurate in light of the fact that the stock price went from 5.50 a share down to $2 a share?

A. I probably began to think that in my mind.

(Cutler dep., April 29, 1999, pp. 65-68)

Q. When is it that you first believed, to use the term you used two weeks ago, that you had been jipped in this investment in Jasmine?

A. Well, jipped probably as the stock was going down.

Q. Which was in 1994 or '95?

A. '95.

Q. '95?

A. Yeah.

Q. So at no time in 1994 did you come to the conclusion that you had been jipped or cheated in your investment in Jasmine?

A. Well, I didn't like the direction of the stock but seemed to be all right.

Q. Seemed to be all right?

A. It will come back.

Q. So you were satisfied, were you, in 1994 about the question of whether or not you had been defrauded or cheated in your investment in Jasmine?

MR. FUTTERMAN: Object to the form of the question.

A. Not defrauded in '94.

Q. All right. Well, at any time in 1994 did you begin to ask yourself the question whether or not you had been cheated in investing in Jasmine?

A. Well, you always ask yourself what seems to be going wrong here.

Q. All right. And did the question arise in your own mind in 1994 as to whether or not you had been cheated in being induced in some way to invest in Jasmine?

A. It may have arisen in my mind. Something like that always does go through your mind.

Q. And when was it in 1994 that that arose in your mind?

A. Probably in the late spring.

Q. Of 1994; is that right?

A. Yeah.

(Cutler dep., April 29, 1999, pp. 119-121)

Q. And the question was: Late in the spring of 1994? And the answer was: Right. When you gave that testimony, were you guessing about the date?

A. I was guessing.

Q. After thinking about it, do you still believe that the light came on in the spring of 1994?

A. No.

Q. When do you think that happened?

A. Following year.

Q. You testified that late in the summer of 1994, you told your son-in-law that it doesn't look good. Did you have any reason to suspect fraud at the time you told him that?

A. No, I didn't.

Q. If you had suspected fraud in December of 1994 in connection with your Jasmine investment, what would you have done?

A. Sold the stock.

Q. Did you have any reason to believe in the summer of 1994 that Jasmine stock couldn't come back?

A. No.

Q. At any time in 1994 did you have any facts that indicated to you that Jasmine had perpetrated a fraud in its IPO?

A. No.

Q. At any time in 1994 did you have any information that Arthur Andersen had failed to conduct its audit of Jasmine's September 30, 1993 numbers—

A. No.

Q. —with generally accepted auditing standards or generally accepted accounting principles?

A. No.

Q. If at any time in 1994 you had any information that Jasmine had reported phoney numbers in its prospectus, what would you have done?

A. Sold the stock.

Q. If at any time in 1994 you had any information that Arthur Andersen's 1993 audit or Fishbein's 1992 audit had not been conducted in accordance with the proper standards of their profession, what would you have done?

A. Same thing, sell the stock.

Q. The record in this case shows that Jasmine stock last traded on NASDAQ at the end of March of 1995. Before Jasmine stopped trading in 1995, did you have any information that led you to believe that Jasmine had perpetrated a fraud in connection with the IPO?

A. No.

Q. Before the stock stopped trading in March 1995, did you have any information that led you to believe that Arthur Andersen's audit of the 1993 financial statements of Jasmine had not complied with generally accepted accounting principles or generally accepted auditing standards?

A. No, I didn't.

Q. During any conversation that you had with Sands' employees in 1994, did anyone from Sands ever tell you that Jasmine reported phoney figures for the year ending September 30, 1993?

A. No, they didn't.

Q. If somebody at Sands had done that, what would you have done?

A. Sell the stock.

Q. At any time in 1994 did you think Jasmine, to use your vernacular, was going in the can?

A. I didn't think so.

Q. If you had, what would you have done?

Q. I would have sold the stock.

Q. Do you recall if you formed your belief that the rapid decline in the stock meant the prospectus was not correct before or after the date on which you made that notation, No market for the stock?

A. It would have been after.

Q. Did anyone or anything warn you of any risk before you made your investment in Jasmine that its financial statements, as reflected in the prospectus, might be fraudulent?

A. No.

Q. Were you willing to make an investment in the stock—would you have been willing to make an investment in the stock if you knew the financial statements were fraudulent?

A. I wouldn't.

Q. Did anyone or anything warn you prior to your investment in Jasmine stock that Arthur Andersen's 1993 audit might be contrary to generally accepted auditing standards or generally accepted accounting principles?

A. No.

Q. And, in fact, when it was down to $2 a share, forget about the year, when it was down to $2 a share the light went on, didn't it?

A. Came very concerned.

Q. Very concerned. And in fact, you thought when it was about $2 a share that you were being cheated?

A. In a way.

Q. Okay. And in a way that you thought that there was something going on that was not right here because you but it at 5.50 and six months later it's down to a dollar and-a-half, $2 a share, correct?

A. I just thought it wasn't performing, and calls to Sands Brothers they said that it's all right, they're just, I think their earnings were not going to meet expectations, that's why, but everything was all right.

Q. Right. All I want to know is that: In your own mind, by about June or July 1994, you had great concerns, did you not, that what was represented to you in December about the, in the prospectus about the financials and the wherewithal of Jasmine wasn't actually truthful?

A. No.

Q. You didn't have that concern in July?

A. No, no.

Q. Okay.

A. Just that the stock was not performing. I didn't think—

Q. And, well, didn't you call Sands Brothers and say to Sands, say to Mr. Bonaventura at Sands Brothers, Something's wrong with the stock?

A. No. I asked them what's wrong.

Q. And they said—then they gave you a typical salesman's response?

A. Right.

Q. But, in fact, instead of asking them, didn't you say, Something's got to be wrong with this stock?

A. No.

Q. You never said that?

A. No. . . . I thought it was going to come back. . . . You know, you keep emphasizing this light went on. You look at the price, you see it's going down, you say, well, it's not doing well but it should be all right, especially when I got encouragement from Sands Brothers.

Q. So all through 1995, then, there was no concern that the prospectus wasn't as stated?

A. Through 1995?

Q. Sure.

A. No.

Q. So in 1995 sometime you became concerned that the prospectus wasn't as stated?

A. Not about the prospectus, no. I didn't know what was going on.

Q. In 1995, did you become concerned that the financials of Jasmine weren't as stated in the prospectus?

A. The only time I became concerned is when it stopped trading.

Q. Is it your testimony now that not until the stock stopped trading was that when you became concerned about the financials that were in the prospectus?

A. When it stopped trading I became concerned about the whole thing, yes.

Q. Because you lost your money?

A. Yes.

Q. And did you ever try to sell the stock from the date you bought it up to the date it stopped trading?

A. No.

Q. And specifically, sir, did you consider or think about at all during these last two weeks the question of whether your testimony on April 14 as to 1994 being the time when you came to the conclusion that you had been cheated in the Jasmine investment would help or hurt your position in this lawsuit with regard to the statute of limitations?

A. I didn't think about cheated. I said jipped in the reference that I had made a bad investment, but cheated has a different meaning to me.

(Cutler dep., April 29, 1999, pp. 61-187). Bonaventura's deposition testimony follows:

Q. Did there ever come a time, sir, when you began to question the integrity of Jasmine management?

MR. FEENEY: Object to form.

A. Well, any time a stock goes down significantly, you question whether or not there is a problem at the company regardless of what the stock is.

Q. When did that time come for you?

A. When I started questioning whether or not this was—there was a problem with the company?

Q. Yes.

A. Oh, probably when the stock was roughly—I don't know if it is necessarily the price of the stock, but roughly, $3, 2-1/2, $3, $4.

Q. Did you tell your clients you were questioning management's integrity at that time?

A. I wasn't questioning management's integrity. I said I believe there possibly was a problem at the company. Normally, the stock price dictates what is going on in the company.

Q. Did you tell your clients there might be a problem at the company?

A. I—I was trying to obtain any information I possibly could which would give me an explanation as to why the stock price was going down.

Q. From whom were you trying to obtain information.

A. We would call the company all the time. In fact, I personally spoke to Irv Mangel myself. I even went to one of their trade shows.

Q. What information did you obtain about why the stock was going down?

A. Nothing, really.

Q. What did you tell your clients the price of the stock was going down?

A. I explained to them we were doing all we possibly can to find out what is going on at the company, stock going down, possibly people getting bored with the stock, moving out of the stock, moving on to the next one. We certainly never recommended selling the stock because we had no reason to do that. We had, you know, tried to do everything we possibly could to obtain information on Jasmine, and we told people just to sit tight.

Q. So that was your advice to clients?

A. Not to see?

Q. Right.

A. We did not recommend to sell, no.

Q. And that's what you told Bernie Cutler?

A. I told Bernie Cutler, who called many times, and after a while I said to him "Bernie, if you're not satisfied with the information that I've given you, why don't you call the people you know over at Jasmine to find out information as well," which he did many time as well, he told me.

Q. Did there ever come a time when you questioned the integrity of Jasmine's management?

MR. FEENEY: Objection to form.

A. Well, when companies don't meet their business plan, you obviously are not happy with the situation. They forecasted numbers, and eventually didn't meet those numbers, and that's when the stock eventually went to zero.

Q. Did there come a time when you questioned the integrity of Jasmine management?

MR. FEENEY: Object to form.

A. When the stock was at zero, I certainly questioned the integrity of management.

(Bonaventura dep., 7/9/99, pp. 56-61)

A. I've seen companies report bad earnings before. Doesn't necessarily mean the company is going out of business. All various factors companies—

Q. Companies run into difficulties and things happen and they suffer losses?

A. In this particular instance, I think a lot of it at that point was blamed on the weather.

Q. So the publication of that 10-Q was no particular warning sign of any kind that there was something drastically wrong with the company, was it?

MS. TEMPLE: Objection.

MR. FEENEY: Objection to form.

A. It wasn't a good sign.

Q. It didn't tell you a fraud had been perpetrated, did it?

MS. TEMPLE: Objection to form.

MR. ROTH: Objection.

A. I don't think you can derive fraud from that, but I'm sure people were questioning whether this company was going to rebound.

A. By the time we got to, let's say June, July, I mean we got to a certain point where we were no longer getting as many answers from management as we would have liked, so you know people obviously becoming very upset with the price of the stock. We didn't have any answers to give them. . . . At that point we certainly began to question the integrity of the management.

Q. Are you changing your testimony?

A. Well, when you have no answers to give somebody, then you have to obviously say that, you know. I didn't give up on the stock certainly until the stock went to zero.

Q. You didn't start to recommend people selling the stock before it went to zero, did you?

A. No.

(Bonaventura dep., 7/9/99, pp. 67-73)

A. Did I tell my clients to get out of the stock as fast as possible? . . . No, I didn't.

Q. At any point prior to the stock stopping—at anytime prior to the time when the stock stopped trading, did you ever suspect that there had been a fraud perpetrated by Jasmine management?

A. Again, I personally did not go to the extent of thinking that was fraud. I just thought it was mismanagement at some point not meeting projections.

Q. Mismanagement in your mind is not a fraud?

A. Mismanagement is not fraud, no, not in my opinion.

Q. Did there ever come a point when you believed that Jasmine management had perpetrated a fraud?

MS. TEMPLE: Not just suspected, but believed?

A. Did I suspect possibly a fraud in Jasmine's—

Q. Yes.

A. Yes I had suspicions. I don't know what the—

Q. What caused you to have that suspicion?

A. Stock went to zero and the company is no longer in existence.

(Bonaventura dep., 7/9/99, pp. 131-139)

Q. When Mr. Cutler called you, what did he say, "I'm upset with the price of the stock"?

MR. ROTH: Which time?

A. "I'm upset, I'm irate, there must be something wrong." He started saying there must be something wrong with the company, it is fraud, this and that, and I said, "I'll give you every piece of information I could give you, Mr. Cutler."

Q. When did he say it was fraud?

A. Obviously later on.

Q. When obviously?

A. I don't recall the exact time, he called so many times.

Q. What words did he use in connection with the use of the word "fraud"?

A. "There must be some type of fraud going on here with the stock being the way it is."

Q. What did you tell him?

A. "I'm not aware of any fraud."

Q. If you had been, you would have told him, wouldn't you?

A. I believe so, yes.

Q. You didn't suspect any fraud, did you?

A. As any [sic] mentioned earlier, I felt there was obviously something wrong with the company, with the stock the way it is. . . . As I told you before, sitting in this chair right now I would say there had to be some fraud because the company is out of business and the stock is at zero, but I don't know that for sure. I can only speculate on fraud. I have no idea.

Q. Let's make the record perfectly clear now. At no time prior to the stock ceasing its trading in March of '95 did you believe that a fraud had been perpetrated; is that correct?

A. No, I suspected or thought to myself that there might be a problem or there might be fraud, but that would only be speculation, and I don't pass on speculative rumors to my clients, I deal in facts.

(Bonaventura dep., 7/9/99, pp. 186-190).

"In the context of the statute of limitations defense, where contrary inferences may reasonably be drawn from the facts which are material to when the cause of action accrued, defendants bear a heavy burden of showing that the claims are untimely as a matter of law." *Gruber v. Price Waterhouse*, 697 F.Supp. 859, 861 (E.D.Pa.1988), *aff'd* 911 F.2d 960 (3d Cir.1990) (citing *Van Buskirk v. Carey Canadian Mines, Ltd.*, 760 F.2d 481, 487 (3d Cir.1985); *Mosesian v. Peat, Marwick, Mitchell & Co.*, 727 F.2d 873, 877 (9th Cir.), *cert. denied*, 469 U.S. 932, 105 S.Ct. 329, 83 L.Ed.2d 265 (1984)). Cutler's Section 11 claim would be barred if he knew or should have known by the exercise of reasonable diligence of the untrue statements or omissions in the registration statement more than one year before Berger filed the Complaint in this action on November 17, 1995. *See Gruber*, 697 F.Supp. at 861. Similarly, the 10(b) claim would be barred if Cutler knew of the alleged fraud prior to November of 1994. As can be seen from a reading of the above testimony, although when taken in a vacuum there is testimony which could lead one to make a determination on

the statute of limitations and whether there was notice, the entirety of the record indicates that genuine issues of material fact preclude summary judgment on this ground.

The Court does not find that Andersen has established, through the use of Cutler's deposition testimony, an absence of genuine issues of material fact regarding Cutler's having actual notice of his securities claims in the Spring of 1994. Further, the Court is not convinced as a matter of law that prior to November of 1994, plaintiff Cutler had sufficient information of possible wrongdoing to "excite 'storm warnings' of culpable activity" to impose a duty of reasonable diligence which, if pursued, would have disclosed the alleged fraud.

In this case, Andersen has pointed to no rumors or vague charges of sufficient substance to arouse suspicion. The actual notice theory is based on the decline in stock price, which, as Cutler alluded to during his deposition, could have an innocuous cause, nothing to do with fraud. Thus, the alleged "storm warnings" cited by Andersen are not necessarily indicative of fraud or culpable conduct.[15] *Compare Gruber v. Price Waterhouse*, 911 F.2d 960 (3d Cir.1990) (Earlier than one year before the section 11 cause of action was filed, plaintiff was aware of the following reports of fraud by management of the subject company, which were held to have put him on inquiry notice: "after reporting knowledge of fraud by [the company] management to the bankruptcy trustee, outside counsel for [the company] withdrew from representation; the trustee was also informed that the FBI had found several of [the company]'s financial and accounting records in a city dump; the trustee was served

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[15] As one court has stated, "inquiry notice starts to run when 'a person of ordinary intelligence would have suspected that he or she was being defrauded.'" *Leach v. Quality Health Services, Inc.*, 902 F.Supp. 554, 557 (E.D.Pa.1995) (citations omitted).

with a state grand jury subpoena after a state investigation into [the company] was instituted; a federal investigation was similarly initiated; and investigators linked [the company's primary customer]'s sole shareholder and principal officer to organized crime. . . . [A] former financial officer of [the company] and an accountant both testified to occurrences of fraud by [the company] in connection with financial reporting. . . . [P]laintiffs began to receive documents from Price Waterhouse, including a "Management Letter" specifying deficiencies in [the company]'s accounting procedures.").

The Court realizes that "the time from which the statute of limitations begins to run is not the time at which a plaintiff becomes aware of all of the narrow aspects of the alleged fraud, but rather the time at which plaintiff should have discovered the general fraudulent scheme." *In re Prudential Ins. Co. of Am. Sales Practice Litig.*, 975 F.Supp. 584, 599 (D.N.J.1996) (quotation omitted). Nonetheless, as this Court discussed in a prior Order, related to the drop in the price of stock,

> Jasmine did experience losses, and these economic conditions were reported in its 10-Q forms as early as February 14, 1994. However, throughout this period, Andersen, one of the "big six" accounting firms, did not adjust its position which approved of Jasmine's financial statements and economic viability. Additionally, the December 19, 1994 8-K form, while it revealed Andersen withdrew as Jasmine's accountant, did not reveal any discrepancies or irregularities in Jasmine's previous financial statements. Andersen's withdrawal was reported as a "mutual" parting, which does not necessarily infer any potential illicit conduct.

December 1, 1997 Order, pp. 15-18. Thus, the drop in the price of stock did not seem to excite storm warning as far as Andersen was concerned. The Fifth Circuit, in *Summer v. Land & Leisure, Inc.*, 664 F.2d 965, 969 (5th Cir.1981),

cert. denied, 458 U.S. 1106, 102 S.Ct. 3484, 73 L.Ed.2d 1367 (1982), stated, in dicta, "[w]e can conceive of several factual situations in which a price decline, under the circumstances here, would not be indicative of fraud in the least, e.g., a depressed real estate market caused either by tight money or recession." *Id.* The cases cited by Andersen for the proposition that dramatic stock price declines can put investors on inquiry notice of potential securities claims may be distinguished because they each also involved misrepresentations relating to the value of the stock and that the investments would produce a stable or stellar income with minimal risk. *See, e.g., Tregenza v. Great Am. Communications Co.*, 12 F.3d 717, 720 (7th Cir.1993), *cert. denied*, 511 U.S. 1085, 114 S.Ct. 1837, 128 L.Ed.2d 465 (1994) (Where a stock which plaintiffs had been told a year earlier was greatly undervalued and would soon be worth twice as much and at worst would not fall by more than 10 percent had lost almost 90 percent of its value, an investor would have become suspicious and investigated when the company's "emphatic and precise prediction was so swiftly and dramatically falsified."). In such a case, it is conceivable that a sharp decline in the value of a security shortly after a representation that the security will produce a stable income without any risk "would in fact tend to indicate that the representation was false." *Summer*, 664 F.2d at 969 n. 2.

In this case, however, the decline in stock price alone which caused "concern" to Cutler is insufficient to have put him on inquiry notice prior to November of 1994. He did not have knowledge of facts sufficient to put a reasonable person on notice of the alleged fraud.[16] Moreover, reading the entirety of his testimony, the Court cannot hold, as a matter of law, that there are no genuine issues of material fact precluding a finding that Cutler was on actual notice of the

[16] In addition, the price of the stock appeared to be rebounding for a short time just two months prior, in September of 1994.

securities claims in the Spring of 1994. In so holding, this Court is mindful of its duty to refrain from making credibility determinations on a motion for summary judgment.

3. *Motion as Against Berger's Claims*

i. Andersen argues that Berger's federal securities claims are time-barred.

Again, Andersen argues that Berger's federal claims are time-barred because his testimony confirms that he was put on inquiry notice by May of 1994 but did not contact counsel until September of 1995. Andersen also argues that inquiry notice is established by Jasmine's quarterly reports and decline in stock price, Jasmine's December 31, 1993 Form 10-Q filed February 14, 1994 which disclosed a $1 million loss for the quarter ending two weeks after the IPO, Jasmine's March 31, 1994 10-Q filed May 11, 1994 which reported a $1.4 million loss for the previous six month period and the termination of McKowan Lowe as a source of income, and the fact that McKowan still owed $856,000 on the $915,000 it had given as part of an Option Sale.

Plaintiffs argue that these same arguments were raised in a motion to dismiss and were rejected by this Court. Further, plaintiffs argue that Andersen chopped up the deposition testimony it cites for support and that although Berger's testimony indicates his anxiety, it does not indicate that he suspected culpable activity or fraud.

Having reviewed the deposition testimony which is now part of the record, the Court does not find that Andersen has met its burden of establishing no genuine issue of material fact in the premise that Berger was on inquiry notice before November of 1994. As with Cutler, the testimony indicates Berger's anxiety with the performance of the stock, but not that he suspected culpable activity. For the additional reasons discussed in the denial of the motion to dismiss based on these grounds and in the above subsection relating to whether

Cutler's federal claims are time-barred, the Court will deny summary judgment on the basis that Berger's claims are time-barred.

ii. Andersen argues that Berger's section 10(b) claim, as well as his claims for negligent misrepresentation and common law fraud, must fail because Berger did not rely on Andersen's 1993 Audit Report.

The second argument raised by Anderson in support of its motion on plaintiff Berger's claims is that Berger cannot demonstrate the requisite causation under Rule 10b-5 because his decision to purchase the Jasmine stock was based "solely on the oral representations of his broker . . . and without even seeing the Prospectus beforehand." In response, Berger argues that he indirectly relied on the 1993 audit report and Prospectus because his broker relied on them when he recommended the Jasmine stock. Moreover, he argues that he is entitled to a presumption of reliance under a "fraud on the market" or "fraud created the market" theory.

Where a 10b-5 action is premised on an alleged misrepresentation, the plaintiff must demonstrate that the defendant's misrepresentation caused him to purchase stock and incur damages. *See* Rule 10b-5. *But see Semerenko v. Cendant Corp.*, 216 F.3d 315, 2000 WL 772933, * 10 (3d Cir. June 16, 2000) (noting that presumption of reliance is recognized in certain cases). In order to establish such reliance, it is not necessary for a plaintiff to show that he personally read the allegedly misleading materials. Derivative reliance is sufficient. *See VT Investors v. R & D Funding Corp.*, 733 F.Supp. 823, 834 (D.N.J.1990) (noting that 10b-5 does not require direct contact between plaintiff and defendant). *See also Itoba Ltd. v. Lep Group PLC*, 54 F.3d 118, 122 (2d Cir.1995), *cert. denied*, 516 U.S. 1044, 116 S.Ct. 702, 133 L.Ed.2d 659 (1996) (finding reliance where plaintiffs relied upon report which contained conclusions that were predicated upon allegedly misleading materials); *Austin*

v. Loftsgaarden, 675 F.2d 168, 177-78 & n. 19 (8th Cir. 1982), *rev'd on other grounds sub nom. Randall v. Loftsgaarden*, 478 U.S. 647, 106 S.Ct. 3143, 92 L.Ed.2d 525 (1986) (finding derivative reliance where plaintiff relied upon third parties who testified that they relied upon deceptive materials).

In this case, it is undisputed that Berger relied upon the representations of his Sands broker, Steven Franklin, when he purchased the Jasmine stock. Berger Dep. at 31. Anderson argues, however, that Berger has failed to demonstrate that Mr. Franklin in turn relied upon the Prospectus or 1993 audit report when he recommended the Jasmine stock.

The only evidence in the record as to what information Mr. Franklin based his recommendations comes from Berger's deposition. During his deposition, Berger describes how Mr. Franklin "strongly urged" him to buy the Jasmine stock. Specifically, Mr. Franklin allegedly told him that "an I.P.O. [was] coming out" and "he mentioned Jasmine and he mentioned to me that this is a very good I.P.O. I mean the company is doing extremely well, they're expanding sales. I mean, they're a—it's a very excellent firm. Their earnings are increasing, and he strongly urged me to buy that stock." Berger Dep. at 31. Berger subsequently explained that he relied on Mr. Franklin's recommendation because he "took for granted that they had thoroughly examined the claims made in the prospectus." Berger Dep. at 36.

From Mr. Franklin's purported statements that Jasmine "was expanding sales" and "its earnings are increasing," a reasonable jury could infer that Mr. Franklin was relying on the "fraudulently inflated" sales and earnings reported in the Prospectus when he recommended the Jasmine stock to Mr. Berger. Therefore, the Court will deny summary judgment on this ground and need not address plaintiff's theories of "fraud on the market" or "fraud created the market" or resolve the nature of the 10b-5 violations.

iii. Andersen argues that Berger's section 11 claim must fail because Berger did not buy in the IPO.

Section 11 provides:

In case any part of the registration statement, when such part became effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading, any person acquiring such security (unless it is proved that at the time of such acquisition he knew of such untruth or omission) may, either at law or in equity, in any court of competent jurisdiction, sue

(1) every person who signed the registration statement;

(2) every person who was a director of (or person performing similar functions) or partner in the issuer at the time of the filing of the part of the registration statement with respect to which his liability is asserted;

(3) every person who, with his consent, is named in the registration statement as being or about to become a director, person performing similar functions, or partner;

(4) every accountant, engineer, or appraiser, or any person whose profession gives authority to a statement made by him, who has with his consent been named as having prepared or certified any part of the registration statement, or as having prepared or certified any report or valuation which is used in connection with the registration statement, with respect to the statement in such registration statement, report, or valuation, which purports to have been prepared or certified by him;

(5) every underwriter with respect to such security . . .

If such person acquired the security after the issuer has made generally available to its security holders an earning statement covering a period of at least twelve months beginning after the effective date of the registration statement, then the right of recovery under this

> subsection shall be conditioned on proof that such person acquired the security relying upon such untrue statement in the registration statement or relying upon the registration statement and not knowing of such omission, but such reliance may be established without proof of the reading of the registration statement by such person.

15 U.S.C. § 77k(a).

In *Ballay v. Legg Mason Wood Walker, Inc.*, 925 F.2d 682 (3d Cir.), *cert. denied,* 502 U.S. 820, 112 S.Ct. 79, 116 L.Ed.2d 52 (1991), the Third Circuit held that § 11 and § 12(2) of the 1933 Securities Act apply only to stocks bought in an initial public offering and not to stocks purchased through secondary market transactions. Further, the Supreme Court in *Gustafson v. Alloyd Co., Inc.,* 513 U.S. 561, 115 S.Ct. 1061, 131 L.Ed.2d 1 (1995), referring to the *Ballay* case asserted that the word "prospectus" in § 12(2) precludes liability under this section for anything other than a stock purchase on an initial offering.

The Third Circuit has noted that if a plaintiff's "shares were purchased in the secondary market, they would not be linked to a registration statement filed during the class period, and the § 11 claim would fail." *Shapiro v. UJB Financial Corp.*, 964 F.2d 272, 286 (3d Cir.), *cert. denied,* 506 U.S. 934, 113 S.Ct. 365, 121 L.Ed.2d 278 (1992). Thus, purchasers on the open or secondary market have no cause of action under section 11 because, by definition, their purchases were not made pursuant to an initial public offering. *Gannon v. Continental Ins. Co.*, 920 F.Supp. 566, 575 (D.N.J.1996). *See also Brosious v. Children's Place Retail Stores*, 189 F.R.D. 138, 143-44 (D.N.J.1999) (concluding that legislative history supports theory that secondary market purchasers do not have standing under § 11 because Congress has not required the distribution of the registration statement for a

period after an IPO as a necessary safeguard of secondary market transactions).

Jasmine conducted its initial public offering on December 15, 1993 when its registration statement became effective. Sands Brothers was to sell 1,666,667 shares of Jasmine stock to the public at $5.50 per share.[17] In addition, Jasmine granted Sands Brothers an option, exercisable within 30 days, to purchase up to 250,000 additional shares "on the same terms" to cover any over-allotments. The IPO closed on December 22, 1993. On January 7, 1994, Sands Brothers exercised its over-allotment option for 250,000 shares.

Plaintiff Harry Berger purchased 2,700 shares of Jasmine stock from Sands Brothers on January 11, 1994 at a price of $6 7/8 per share with a markup of 1/8. Andersen has produced an expert affidavit from the former Commissioner and Acting Chairman of the SEC who has interpreted this information to conclude that Berger did not buy in either the IPO or from the over-allotment of shares. Affidavit of Charles C. Cox, Exhibit 1 to Appendix, Part I attached to Andersen's motion. If Berger purchased in the IPO, his purchase would have been on December 15, 1993 [18], the date the registration statement became effective, and whether he purchased in the IPO or from the over-allotment, his purchase price would have been $5.50. The affidavit of Alan Bluestine. Managing Director of Sands Brothers, corroborates this [19]. Exhibit 2 to Appendix, Part I attached to Andersen's motion.

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[17] Secondary market trading in Jasmine stock began in the Nasdaq market December 16, 1993.

[18] If he purchased from the over-allotment, according to Cox, his shares would have been committed to him on or about December 15, 1993, despite the fact that Sands Brothers did not exercise its option until January 7, 1994.

[19] This affidavit also states that Sands Brothers just so happened to have been the market maker for plaintiff's transaction.

Berger argues that he can trace his shares to Jasmine's registration statement, as can all shareholders because Jasmine could only issue shares to the public pursuant to the registration statement, thus the only shares that the public could have traded were those issued pursuant to that registration statement. This argument has been rejected within this circuit, however. *See Warden v. Crown Am. Realty Trust,* 1998 WL 725946, *3 n. 2 (W.D.Pa.1998) (argument "effectively guts *Ballay*'s cabining of § 11 to initial offerings and gives that section essentially the same reach as the Exchange Act, but without its scienter requirement.") This Court also is not persuaded by Berger's tracing argument, but rather is convinced by the rationale of *Brosious*, 189 F.R.D. at 143-44, which is based in large part on legislative history combined with the recent decisions of the Supreme Court and the Third Circuit, that Berger must have purchased in the IPO in order to be able to recover on his section 11 claim. The Third Circuit also has used legislative history to construe the meaning of the 1933 Act:

> Congress' intent in enacting the 1933 Act was clearly to regulate initial offerings. In the House Report accompanying the 1933 Act, the legislators specifically stated: '[t]he bill affects only new offerings of securities sold through the use of the mails or of instrumentalities of interstate or foreign transportation or communication. It does not affect the ordinary redistribution of securities unless such redistribution takes on the characteristics of a new offering by reason of the control of the issuer possessed by those responsible for the offering.'

Ballay, 925 F.2d at 690 (quoting H.R. No. 85, 73d Cong., Sess. 7(1933)). Though the *Ballay* court ostensibly considered a different section of the 1933 Act, it is its interpretation of the 1933 Act in its entirety that is consequential and which leads this Court to rely on the *Brosious* opinion.

Berger has filed a motion for leave to file a surreply to Andersen's motion for summary judgment in order to present additional evidence that Berger did purchase his Jasmine stock in the IPO. Berger has produced "trade runs" from Morgan Stanley, Sands' clearing broker, covering the period December 15, 1993 through January 10, 1994 which supposedly reflect every sale of Jasmine stock during this period. These trade runs, according to Berger, show that only 1,910,167 Jasmine shares sold at $5.50 prior to December 22, 1993, leaving 6500 shares of IPO-issued stock unaccounted for, and possibly bought by Berger and others shortly after January 7, 1994.

At the outset, the Court notes that these "trade runs" are unauthenticated.[20] Nonetheless, plaintiff Berger will be granted leave to file his surreply, but the Court finds it insufficient, in light of the evidence provided by defendants pursuant to Rule 56(e), to create a genuine issue of material fact regarding whether he purchased in the IPO. The Court finds that Berger did not purchase his shares of Jasmine stock in the IPO or over-allotment, and so summary judgment will be granted on his section 11 claim.

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[20] On the other hand, in response to Berger's motion, the defendants have provided the Court with a declaration under penalty of perjury from counsel to Morgan Stanley attaching computer generated documents which were also provided to plaintiffs in response to a subpoena. These documents indicate that Bernard Cutler purchased Jasmine stock and was coded as a "46" in the MKT OPT column of the trade runs and Harry Berger purchased Jasmine stock and was coded as a "45". Morgan Stanley's counsel indicates that she was informed by the appropriate employees of Morgan Stanley that "46" reflects trades booked to the "Syndicate Retail Blotter", which means they were purchases or sales in connection with an initial public offering. Sales coded as "45" reflected "OTC Cross Net as Principal Blotter" which was indicated to mean that these were secondary market or non-IPO trades executed over the counter. Morgan Stanley informed plaintiffs' attorneys of this information when the trade runs were produced.

iv. Andersen argues that Berger's state law based claims must fail because Berger has not established causation.

Finally, Andersen summarily argues that Berger's state law claims under the Illinois Consumer Fraud Act, negligent misrepresentation, and common law fraud each require plaintiff to establish the element of causation, which he cannot do because he bought Jasmine stock based solely on his conversation with a Sands broker and never saw the Prospectus, which contained Andersen's audit report, before purchasing the stock. Thus, Andersen's report had no causal effect on Berger's investment in Jasmine stock.

For the same reasons discussed under the section of this Opinion dealing with whether Berger can prove reliance, this Court will deny summary judgment on these claims as precluded by genuine issues of material fact.

B. *Cutler's Motion for Class Certification*

As outlined above, on February 2, 2000, plaintiff Cutler filed a motion for class certification on behalf of all purchasers of publicly-traded securities of Jasmine, Ltd. who purchased during the period from December 15, 1993 through and including June 20, 1995. In this newest motion, Cutler asks this Court to certify a class for those claims which were not before the Court in the motion for preliminary approval of the Fishbein settlement and where reliance is not an element. Thus, Cutler seeks certification of his claims under Sections 11 and 12(2) of the Securities Act of 1933, arguing that any relationships he may have had with Jasmine insiders are irrelevant to these claims which do not require a showing of reliance.

1. *Arguments by the Parties For and Against Certification*

In arguing that Cutler's claims are typical of the class, his attorneys point out that Cutler purchased his shares from Sands Brothers in the IPO after he read the prospectus.

According to Cutler, in order to recover on a Section 11 claim, he and the class must show only that (1) they purchased securities traceable to an effective registration statement; (2) defendants fall within the statutory categories of persons who may be sued; and (3) the registration statement contained a material misstatement or omission. *Herman & MacLean v. Huddleston*, 459 U.S. 375, 381-82, 103 S.Ct. 683, 74 L.Ed.2d 548 (1983); *In re MobileMedia Sec. Litig.*, 28 F.Supp.2d 901, 923 (D.N.J.1998).

Next, Cutler argues that he is an adequate class representative and that his counsel are highly experienced and competent in the area of securities class actions.

Finally, Cutler seeks certification under Rule 23(b)(3), arguing that common questions predominate and a class action is the superior method of adjudicating this suit.

Andersen and Sands Brothers filed briefs in opposition to the class certification motion. Andersen argues that this Court already has determined that Cutler cannot represent the class with respect to the common law fraud and negligent misrepresentation claims because his access to non-public information about Jasmine subjects him to the unique defense of non-reliance on the alleged misrepresentations contained in the Prospectus. Andersen points out that the same reasoning of "insider" access applies to Cutler's claim under Section 10(b) of the Securities and Exchange Act of 1934. Andersen argues that Cutler's representation of a Sections 11 and 12 class, while simultaneously maintaining his additional individual claims, would create a conflict of interest because the putative class members will remain unrepresented with regard to three of their potential claims, which Cutler will be free to pursue without sharing in the proceeds. Andersen also argues that conflicts of interest render Cutler's counsel inadequate because Berger and Cutler have individual claims which may benefit them more than the class claims, and that counsel is inadequate for failure to adequately investigate the

putative class representative so as to discover the alleged "insider" status and for failure to bring a Section 11 claim against Fishbein within the requisite limitations period.

Finally, Andersen contends that Cutler's federal securities claims are time-barred because he was on notice of them no later than the Spring of 1994. Andersen cites to Cutler's deposition testimony in arguing that Cutler had subjective knowledge of his potential securities fraud claims by late Spring of 1994, over one year prior to the filing of either his motion to intervene or Berger's lawsuit. Andersen contends that the sworn testimony of Robert Bonaventura, a senior managing director of Sands who helped Cutler with his purchase of Jasmine stock, confirms that Cutler believed in the Spring of 1994 that he had been defrauded.

Sands Brothers also opposes granting class certification on the same grounds as Andersen, arguing that the statute of limitations defense applicable to Cutler's claims renders them atypical, and stating "Cutler's abandonment of the remaining claims is a complete breach and abdication of his responsibilities to the class and, indeed, represents a conflict of interest with the class." Sands Brothers Brief in Opposition to Certification Motion, p. 2. Moreover, the Sands defendants state, "Cutler's counsel is inadequate because of its mishandling of this case and allowing this case to proceed for five years without an adequate class representative and no prospects of obtaining an adequate class representative." *Id.*

In reply, Cutler argues that the defendants have not identified an aspect of his individual fraud claim which is antagonistic to the class fraud claims; thus, argues Cutler, there is no conflict. He cites *Lazy Oil v. Witco Corp.*, 166 F.3d 581, 589 (3d Cir.), *cert. denied*, 528 U.S. 874, 120 S.Ct. 178, 145 L.Ed.2d 150 (1999) ("the conflict rules do not appear to be drafted with class action procedures in mind and may be at odds with the policies underlying class action rules") and *Weikel v. Tower Semiconductor Ltd.*, 183 F.R.D.

377, 393-96 (D.N.J.1998) (rejecting theoretical conflicts). He argues that, in any event, the value of the class' cumulative Section 11 and 12 claims is much higher than the value of all of Cutler's individual claims which are based on his $5,000 out-of-pocket loss. Further, Cutler argues that courts within this district have held that class certification may be granted as to some but not all of a named plaintiff's claims. *See, e.g., Cannon v. Cherry Hill Toyota, Inc.*, 184 F.R.D. 540, 544-45 (D.N.J.1999) (court rejected argument that named plaintiff was not typical because she asserted a claim under state law in addition to those she asserted on behalf of the class). *See also Grasty v. Amalgamated Clothing and Textile Workers Union, AFL-CIO*, 828 F.2d 123, 130 (3d Cir.1987), *cert. denied*, 484 U.S. 1042, 108 S.Ct. 773, 98 L.Ed.2d 860 (1988) (named plaintiffs were typical although they did not share all of the class claims); *Grossman v. Waste Management, Inc.*, 100 F.R.D. 781, 791 (N.D.Ill.1984) (named plaintiff could not represent 10(b)(5) class because she was subject to nonreliance defense but could adequately represent Section 11 and 12 class).

Finally, Cutler argues that the statute of limitations is not properly at issue on this motion to certify because it goes to the merits of the case and need not be addressed at the certification stage. Nonetheless, Cutler argues, defendants have failed to meet their "heavy burden" of establishing inquiry notice (citing *Gruber v. Price Waterhouse*, 697 F.Supp. 859, 861 (E.D.Pa.1988), *aff'd* 911 F.2d 960 (3d Cir.1990)). *See In re MobileMedia Sec. Litig.*, 28 F.Supp.2d 901, 941 (D.N.J.1998) ("The facts constituting [inquiry] notice must be sufficiently probative of fraud—sufficiently advanced beyond the state of mere suspicion, sufficiently confirmed or substantiated—not only to incite the victim to investigate but also to enable him to tie up any loose ends and complete the investigation in time to file a timely suit.").

2. *Prerequisites to Class Action Certification*

Rule 23(a) of the Federal Rules of Civil Procedure stipulates four prerequisites before a class action suit may be brought. It states:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed.R.Civ.P. 23(a); *see also Liberty Lincoln Mercury, Inc. v. Ford Mktg. Corp.*, 149 F.R.D. 65 (D.N.J.1993). A potential plaintiff must indicate: (1) the numerosity of the lawsuit; (2) the commonality of plaintiff's and prospective class' claim; (3) the typicality of plaintiff's and prospective class' interests; and (4) the adequacy of representation of both the plaintiff and the plaintiff's lawyers of the class. *See Georgine v. Amchem Products, Inc.*, 83 F.3d 610, 624 (3d Cir.1996), *aff'd* 521 U.S. 591, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997). A reviewing court is not to consider the merits of the case when making a determination regarding these four elements. *See Liberty Lincoln Mercury, Inc.*, 149 F.R.D. at 73; *In re Data Access Sys. Sec. Litig.*, 103 F.R.D. 130, 139 (D.N.J.1984). "In addition to the requirements expressly enumerated in Rule 23, class actions are also subject to more generally applicable rules such as those governing standing and mootness." *Holmes v. Pension Plan of Bethlehem Steel Corp.*, 213 F.3d 124, 135 (3d Cir.2000). Significantly, "[t]he Third Circuit has held that 'the interests of justice require that in a doubtful case . . . any error, if there is to be one, should be committed in favor of allowing the class action.'" *In re Data Access*, 103 F.R.D. at 137 (quoting *Kahan v. Rosenstiel*, 424 F.2d 161, 169 (3d Cir.), *cert. denied*, 398 U.S. 950, 90 S.Ct.

1870, 26 L.Ed.2d 290 (1970) (quoting *Esplin v. Hirschi*, 402 F.2d 94, 101 (10th Cir.1968), *cert. denied*, 394 U.S. 928, 89 S.Ct. 1194, 22 L.Ed.2d 459 (1969))).

3. *Necessity of Analysis*

In light of the above ruling on Andersen's summary judgment motion, it would be a futile exercise to evaluate these prerequisites. Despite the fact that a reviewing court is not to consider the merits of the case when making a determination regarding these four elements, the above grant of summary judgment on the claims which plaintiff asks to be certified renders the motion for class certification moot.

The Court notes that this is not a case where the class representative had a live claim at the time he moved for class certification, so the Court should not dismiss the pending motion just because the individual claim has become moot. *See Holmes,* at 136. Rather, the discussion above renders the class claim non-viable, while the individual claim remained intact. Because the Court determined above that the class claims asserting federal securities causes of action are barred by the applicable one year statutes of limitation [21], and because these are the only claims which the instant motion argues should be certified [22], the motion will be dismissed as moot.

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[21] The Section 12 claim also carries a one-year statute of limitations, *Insurance Consultants of America, Inc. v. Southeastern Insurance Group, Inc.,* 746 F.Supp. 390, 404 (D.N.J.1990), so the analysis of the Section 11 and the Section 10(b) claims in summary judgment motion is equally applicable to it.

[22] In a footnote, the plaintiff requests that this Court make a ruling on class certification "on all claims except those at issue in this Court's September 23, 1999 decision related to the Fishbein settlement. In support of the claims not specifically addressed herein, Cutler incorporates by reference the arguments set forth in Cutler's Motion for Class Certification and for Preliminary Approval of Settlement Agreement With Defendant Fishbein & Co. While disagreeing with the Court's analysis in

III. *CONCLUSION*

For the foregoing reasons, defendant Arthur Andersen's motion for summary judgment will be granted in part and denied in part in that (a) summary judgment will be granted on plaintiff Cutler's federal securities class claims but (b) will be denied on plaintiff Cutler's individual federal securities claims; (c) summary judgment will be denied on plaintiff Berger's claims based on the arguments of statute of limitations, reliance, and causation, but (d) summary judgment will be granted on plaintiff Berger's section 11 claim because the Court finds he did not purchase his Jasmine shares in the IPO.

Plaintiff Harry Berger's motion for leave to file a surreply will be granted.

Plaintiffs' motion for class certification will be dismissed as moot.

An appropriate Order will enter.

ORDER

This matter having come before the court (1) on defendant Arthur Andersen LLP's motion for summary judgment on plaintiffs' claims against it brought pursuant to Section 11 of the Securities Act of 1933, 15 U.S.C. § 77k and Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and Rule 10b-5 promulgated thereunder, 17 C.F.R. § 240.10b-5, and on plaintiff Harry Berger's state law claims, and (2) on plaintiff Harry Berger's motion to file a surreply in opposition to the summary judgment motion, and (3) on plaintiffs' motion to certify a class;

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that 9/23/99 decision, Cutler recognizes that the Court's analysis as to Cutler in that order would preclude class certification on all but Cutler's Section 11 and 12 claims." The Court sees this motion as requesting class certification on the Section 11 and 12 claims, as that is what was argued in the opening brief.

For the reasons expressed in this Court's accompanying Opinion,

IT IS ORDERED on this 30th day of June, 2000, that defendant Arthur Andersen's motion for summary judgment [259] is hereby GRANTED IN PART and DENIED IN PART;

IT IS FURTHER ORDERED that plaintiff Harry Berger's motion for leave to file a surreply is hereby [275] GRANTED;

IT IS FURTHER ORDERED that plaintiffs' motion for class certification [276] is hereby DISMISSED AS MOOT.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

[Filed Sep. 23, 1999]

Hon. Joseph H. Rodriguez
Civil Action No. 94-cv-5522

(CONSOLIDATED)

Civil Action No. 96-cv-2318

MCKOWAN LOWE & CO., LTD.,
Plaintiff,

v.

JASMINE LTD., *et al.*,
Defendants,

HARRY BERGER, individually and on behalf of a class similarly situated,
Plaintiffs,

v.

JASMINE LTD., *et al.*,
Defendants.

ORDER

This matter is before the court on plaintiffs' motion pursuant to Rule 23(e) of the Federal Rules of Civil Procedure to certify a settlement class and to preliminarily approve a settlement agreement entered into with defendant Fishbein & Company, P.C., which was Jasmine Ltd.'s auditor from 1988 to 1992, and prepared the 1992 audited financial statements which appeared in the prospectus. For the following reasons, the motion is denied without prejudice.

BACKGROUND

On August 6, 1998, this Court denied certification in this case of "a class consisting of all purchasers of publically-traded securities of Jasmine, Ltd. who purchased during the period from December 15, 1993 through and including June 20, 1995."

In short, this Court found that plaintiff Harry Berger did not satisfy the Rule 23(a) requirement of typicality because his claims and their anticipated methods of proof would not be typical of the class he seeks to represent, among the reasons, because he did not purchase Jasmine stock during the limited window of the IPO and because, as he testified in his deposition, he relied solely on the oral representations of his broker at Sands Brothers, without even seeing a prospectus beforehand. In addition, the Court expressed its concern that plaintiff was not an adequate class representative because it appeared clear that he had little knowledge of the factual predicate of the suit and that he was not properly informed of his duties as class representative.

On September 9, 1998, while a motion for reconsideration of the denial of class certification was pending, plaintiff filed a motion to have Bernard L. Cutler intervene as a plaintiff. On February 19, 1999, with these two motions pending, the instant motion to certify a "settlement class" and to preliminarily approve a settlement agreement with defendant Fishbein & Co. was filed. On March 9, 1999, the motion for reconsideration was denied. On June 29, 1999, the Honorable Robert B. Kugler, U.S.M.J., granted the motion to intervene, and allowed plaintiff to amend the complaint in order to name Bernard L. Cutler as a plaintiff. It is against this procedural backdrop that the Court now considers the motion to certify a settlement class and preliminarily approve settlement with Fishbein & Co.

DISCUSSION

Plaintiffs' motion asks this Court to preliminarily approve a settlement agreement entered into between Fishbein & Company, P.C., and plaintiff Harry Berger and then-putative intervenor-plaintiff Bernard L. Cutler, on behalf of themselves individually and on behalf of a not yet certified class similarly situated. The settlement would take advantage of a $2 million wasting insurance policy held by Fishbein in order to pay out $1.5 million to be divided equally between plaintiffs and Summit Bank, N.A., a plaintiff in the parallel state court action concerning alleged misrepresentations by Jasmine and other defendants in connection with a bank loan from Summit to Jasmine.

Under the terms of the Settlement Agreement, of the $750,000.00 allotted for plaintiffs, $250,000.00 would go to the plaintiffs' attorneys for "partial reimbursement of plaintiffs' expenses" and the remaining $500,000.00 is to be held in escrow "for the benefit of the class, to be suitably invested pending final disposition of the case or the receipt of additional proceeds."

Plaintiffs have argued that there are no grounds to doubt the fairness of the settlement, as it was the result of well-informed, arms-length negotiations after ample discovery was taken. They acknowledge and further state:

> The primary hurdle to preliminary approval is demonstrating to the Court that a class should be certified. Plaintiffs recognize that, prior to final approval of settlement, the Court must find that the proposed class satisfies the requirements of F.R.C.P. 23(a) and 23(b)(3). Towards that end, plaintiffs have submitted a motion for reconsideration of the Order denying class certification. If that motion is denied, plaintiffs request that a class be conditionally certified, so that class certification motions concerning intervenor-

> plaintiff Cutler can proceed concurrently with final approval of the settlement. Plaintiffs submit that Mr. Cutler will be found to be an appropriate class representative.

Later, plaintiffs state:

> Plaintiffs have respectfully requested that the Court reconsider its decision to deny class certification and certify a class represented by Harry Berger. If that class is certified, plaintiffs can combine notice of the Fishbein settlement with the notice to the Class required by F.R.C.P. 23(c)(2).
>
> During the pendency of the motion for reconsideration, or if that motion is denied, plaintiffs request that the Court conditionally certify a class for the purpose of proceeding with this settlement. District Courts have the authority to conditionally certify a class during the pendency of the settlement process.
>
> * * *
>
> If reconsideration is denied, defendants will doubtlessly depose Mr. Cutler, and there will be a new round of briefing concerning class certification. Any further proceedings on class certification can proceed on a parallel track with settlement, so that briefs on class certification can be submitted concurrently with briefs concerning the final settlement.

Indeed, plaintiffs are correct in their statement that the Court must make an initial determination of whether the proposed class satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure. They seem somewhat confused, however, in their thinking that the determination of whether the class certification requirements are met may be put off until a determination on final settlement is reached.

Rather, it is clear that a court using a settlement class in resolving a proposed class action first must find that the requisites of Rule 23 have been met. "Settlement classes must satisfy the Rule 23(a) requirements of numerosity, commonality, typicality, and adequacy of representation, as well as the relevant 23(b) requirements." *In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation*, 55 F.3d 768, 778 (3d Cir.), *cert. denied* 516 U.S. 824 (1995). *Accord Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997). In fact, the Court of Appeals for the Third Circuit has expressly held that "settlement class status (on which settlement approval depends) should not be sustained unless the record establishes, by findings of the district judge, that the same requisites of the Rule are satisfied. Additionally, [the Circuit held] that a finding that the settlement was fair and reasonable does not serve as a surrogate for the class findings an also that there is no lower standard for the certification of settlement classes than there is for litigation classes." *General Motors*, 55 F.3d at 778.

This Court therefore turns to an evaluation of whether Rule 23 is satisfied by the case at hand. In this case, the class is defined in the Settlement Agreement as "all persons other than defendants who purchased Jasmine stock between December 18, 1993 and June 20, 1995 inclusive and who either (1) still own shares of Jasmine stock or (2) paid more for the shares than they received upon sale of such stock."

This Court previously found that in light of the potentially large number of class members, the numerosity requirement of Fed. R. Civ. P. 23(a)(1) was met. Regarding the commonality requirement of Fed. R. Civ. P. 23(a)(2), the Court addressed this requirement in conjunction with the requirement that the claims or defenses of the representative parties must be typical of the claims or defenses of the class pursuant to Fed. R. Civ. P. 23(a)(3). As stated above, the Court held that this requirement was not satisfied with Mr.

Berger as class representative. Similarly, the Court expressed doubts about Mr. Berger's adequacy of representation, Fed. R. Civ. P. 23(a)(4). Now that Mr. Cutler has been permitted to intervene, the Court will reexamine the typicality requirement and whether it has been satisfied in this case, and will assess Mr. Cutler's adequacy of representation.

In advancing Bernard Cutler as a class representative, plaintiffs are very cursory in their opening brief. They argue that "Mr. Cutler's participation, may alleviate some of the concerns" expressed by the Court in its earlier denial of class certification. "For example, Mr. Cutler bought stock directly in the IPO (on the day after the first day of the IPO) from defendant Sands Brothers at the IPO price of $5.50 per share. Plaintiffs are confident that the Court will find Mr. Cutler sufficiently knowledgeable of his responsibilities and of this case to serve as a class representative."

Defendants[1], on the other hand, argue that Mr. Cutler is atypical of the class because he had access to inside information through his relationship with his son-in-law and his son-in-law's close business and personal relationship with a Jasmine principal. They also argue that he was on an insider list of "friends and family" submitted by Jasmine to Sands Brothers seeking preference in the IPO and that as a result of his relationship with a Jasmine principal, Cutler may never have relied upon the information contained in the prospectus. The Sands defendants also argue that Cutler (1) is unaware of the facts of the case, especially as they relate to the Fishbein settlement, (2) has shown that he is unwilling to vigorously prosecute this suit on behalf of the class, (3) is uniquely susceptible to attacks on his credibility, and (4) would be advancing claims that are barred by the statute of limitations. In turn, Arthur Andersen argues that Cutler's failure to

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[1] Briefs in opposition to plaintiffs' motion were submitted by (1) Steven B. Sands, Martin Sands, and Sands Brothers & Co., Ltd., and (2) Arthur Andersen LLP.

represent vigorously the interests of the class with respect to the proposed settlement renders him inadequate. Arthur Andersen also stresses the argument that individual issues of reliance will not allow any class to be certified under Rule 23(b)(3).

The Court understands the defendants' position as being that Mr. Cutler is unique among the class of investors because he was an 'insider' with access to non-public information, making him subject to unique defenses. Apparently, Cutler's daughter and son-in-law were next-door neighbors to Sam Mangel, an officer and owner of Jasmine. In addition, Cutler's son-in-law did business with Sam Mangel and his daughter and son-in-law went on trips with Mangel.

Sands Brothers has provided the Court with an affidavit from Cutler's ex-broker at Sands Brothers, Robert Bonaventura, stating that he called Cutler as a result of Cutler's name, as well as his son-in-law's, being on a "friends and family" list provided by Jasmine. (Exhibit A to Sands Brothers Brief). Bonaventura states that prior to a public offering, the company offering its shares typically provides Sands Brothers, the underwriter, with a list of family and friends of the principals of the company who hope to obtain shares in the offering at the offering price. It is said to be a form of preference and favor for the company. Unfortunately, Bonaventura goes on to state, no one is now able to locate that friends and family list provided by Jasmine. Nonetheless, Bonaventura recalls that when he called Cutler, Cutler said that he had never purchased shares in an IPO but that his son-in-law knew Sam Mangel very well and thought Jasmine would be a good stock to purchase. Bonaventura states that an account was then opened for Cutler and he (and his son-in-law) eventually purchased Jasmine stock.[2]

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[2] Bonaventura recalls giving his friends and family list to his assistant to set up accounts, and because Cutler's account number directly follows

The defendants argue that this is illustrative of the premise that Cutler made his decision to purchase Jasmine stock for reasons other than reliance on the prospectus. Other indications that this was the case, they argue, may be found in Cutler's deposition testimony. He testified that he spoke with his son-in-law about Jasmine before and after he bought the stock. (Cutler dep. 49:8-14.) When asked how he came to buy Jasmine stock on December 16, 1993, Cutler answered:

> My son-in-law had been told by Sam that they were going public and it would be a good stock. In fact, he told all of his friends there. And my son-in-law called me.

(Cutler dep. 105:13-16.) Cutler then continues,

> But I don't take his advice. I said I have to see a prospectus. So he said call Sands Brothers they will be the underwriters and you can get a prospectus from them, which I did. I read it over; it looked very good; so I bought the stock.

(Cutler dep. 105:17-22.) The deposition goes on:

> Q. Now, what did Mr. Weinberg [(the son-in-law)] say about the reasons why he believed this would be a good investment? You told us that he said he thought it was a good investment. What reasons did he give you for that?
>
> A. That's it.
>
> Q. Okay. Did you understand at the time that he was recommending this investment to you that Jasmine was a company owned by his friend, Sam Mangel?
>
> A. Yes.

---

his son-in-law's, Bonaventura confirms that both men were on the Jasmine friends and family list.

Q. And what did you understand to be the source of Mr. Weinberg's belief that this was a good investment at that time in December when he first proposed the investment to you?

A. I guess in his discussion with Sam Mangel.

* * *

Q. That's what you believed at the time, correct?

A. Right.

Q. And when you pursued the possibility of making this investment by calling up Sands Brothers, you did so because you thought you were getting in on a good investment, correct?

A. Yes.

(Cutler dep. 135:10-136:16.)

Although it has not been established that Cutler spoke with Mangel about Jasmine, it is clear that his son-in-law did. Mr. Weinberg was deposed by the defendants, and he testified as follows.

Q. Did you have discussions with Sam Mangel on any of these social occasions, the barbeques, the dinners, children's birthday parties, gambling trips to Atlantic City and Las Vegas about the business of Jasmine?

A. Yes, I did with Sam.

* * *

Q. Tell us, to the best of your recollection, the subjects of the Jasmine business that you discussed with Sam Mangel on those occasions?

A. To the best of my recollection, the conversation that we had would have been sketchy, at best. Just involving, you know, normal things, business being done, problems in the warehouse, problems with employees, things that we may have shared in common.

Q. When you say 'business being done,' what do you mean by that?

A. Just the sort of thing where I knew that Jasmine shoes was doing business with companies like Nordstrom's, things like that.

Q. And did you and Sam Mangel share work experiences with employees and management issues and that type of thing?

A. It may have come up.

(Weinberg dep. 98:13-100:10.) Later, Mr. Weinberg stated, "Obviously I got the information about the IPO through Sam" and "All I can tell you is because I knew Sam, there was a certain comfort level in investing. By that, I mean I wouldn't expect a friend of mine would let me invest in something if it wasn't a long-range potential profitable investment." (Weinberg dep. 246:5-6 & 245:2-10.)

The Court finds that there are significant questions as to whether Mr. Cutler is a typical representative of the proposed plaintiff class. However, it is not the Court's intention to order a hearing to make a credibility determination at this time. Rather, because Cutler appears to bring certain encumbrances to the case that are not typical of the class members he seeks to represent, the Court cannot find that the settlement class satisfies the requirements of Rule 23.[3] Even if he did not rely on any information provided by a Jasmine insider, the Court already sees that because of his relationships, he will be subject to attacks that other class members would not be. *See Wagner v. Lehman Bros. Kuhn Loeb, Inc.*, 646 F. Supp., 643, 660 (N.D. Ill. 1986) ("A putative representative's credibility problem could well divert the jury's 'attention from the substance of the basic claim'

[3] Additionally, it appears that, as with Mr. Berger, Mr. Cutler's reliance on the prospectus or other related documents such as the audit reports and his reliance on the advice of Sands Brothers, as opposed to a Jasmine insider, may have to be proved differently for him than for those class members who may have only seen the prospectus (and/or other documents prepared by some of the named defendants) before purchasing the stock.

and could severely damage '[t]he remaining class members.'"). Arthur Andersen's opposition brief states the situation well: "The very existence of th[e] issue of Mr. Cutler's [possible] reliance on nonpublic information renders him an atypical and inadequate representative because *it would be distracting to focus class resources on these issues to the detriment of a putative class*." (Emphasis added.) *See J. H. Cohn & Co. v. American Appraisal Assoc., Inc.*, 628 F.2d 994, 999 (7th Cir. 1980) ("the presence of even an arguable defense peculiar to the named plaintiff or a small subset of the plaintiff class may destroy the required typicality of the class as well as bring into question the adequacy of the named plaintiff's representation."); *Koos v. First Nat'l Bank of Peoria*, 496 F.2d 1162, 1164 (7th Cir. 1974) ("Where it is predictable that a major focus of the litigation will be on an arguable defense unique to the named plaintiff or a small subclass, then the named plaintiff is not a proper class representative."); *O'Neil v Appel*, 165 F.R.D. 479, 493 (W. D. Mich. 1996) ("To negate the typicality of a representative's claim, it is only necessary that the defense be 'unique, arguable and likely to usurp a significant portion of the litigant's time and energy.'"); *Wagner*, 646 F. Supp. at 660 ("It is enough to deny class treatment when a defense peculiar to the class representative is even arguably present."); *Markewich v. Ersek*, 98 F.R.D. 9, 11 (S.D.N.Y. 1982) (The possibility of the decision to purchase being based on an individual's unique information rather than on the financial statements or the market's reaction to those statements precludes the named plaintiff from adequately advancing the claims of the class. The likelihood of the issue of whether the investment decision was based on considerations other than the financial statements being raised and extensively litigated unnecessarily burdens the class. "The members of the class are entitled to representatives unencumbered by 'unique defenses.'")

Now, plaintiffs raise a good point in their reply brief. They cite to Andersen's opposition brief, which states, "many of the investors in Jasmine were those who knew or knew of the principals of Jasmine, historically a family-run business in Pennsauken, New Jersey and owned by Irving Mangel and Sam Mangel. Cutler was one of those local investors." Plaintiffs argue that this is somewhat of a concession that Cutler actually is not atypical. However, it is plaintiffs' burden to show this Court that Cutler' status as a so-called "insider" purportedly on a "friends and family" list truly is typical of the class of investors he seeks to represent. From the information presented, the Court cannot conclude that Mr. Cutler is a typical representative, and therefore cannot make a finding that Rule 23(a) would be satisfied by the settlement class.

In light of the foregoing, the Court need not address the adequacy of Mr. Cutler's representation, or that of plaintiffs' counsel. Similarly, because the Court is not satisfied that the requirements of Rule 23(a) may be met by the settlement class, the Court will not delve into an analysis of whether the settlement itself is "fair, adequate and reasonable." *Eichenholtz v. Brennan*, 52 F.3d 478, 487 (3rd Cir. 1995); *see also Girsch v. Jepson*, 521 F.2d 153, 156 (3rd Cir. 1975) (setting forth factors district court should consider when determining fairness, adequacy and reasonableness of settlement). Because the parties argue the issue in their briefs,[4] however, the court will evaluate the terms of the

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[4] In their motion to the Court, Plaintiffs sought certification of the settlement class and preliminary approval of the Settlement Agreement. In their reply brief, Plaintiffs challenge Arthur Andersen's standing to object to their motion for preliminary approval of the Settlement Agreement, but do not challenge Arthur Andersen's standing to object to certification of the settlement class. In their briefs, both parties also presented arguments on the preliminary approval of the Settlement Agreement. In light of the

Settlement Agreement for the limited purpose of determining whether Arthur Andersen, as a non-settling defendant, has standing to object to the settlement.

In response to Arthur Andersen's opposition to the proposed settlement, plaintiffs argue that Arthur Andersen, as a non-settling defendant, lacks standing to object to the terms of the proposed Settlement Agreement. Arthur Andersen claims that it has standing to object to the settlement because the Approval and Bar Order attached to the Settlement Agreement would extinguish its right to seek contribution and/or indemnification from Fishbein. Non-settling defendants have standing "to object to a partial settlement where they can demonstrate that they will suffer some formal legal prejudice as a result of the partial settlement." *Eichenholtz*, 52 F.3d at 482; *see also In re School Asbestos Litig.*, 921 F. 2d 1330, 1332 (3rd Cir. 1990), *cert. denied*, 499 U.S. 976 (1991) (stating that non-settling defendants must show interference in legal relationship with settling parties to have standing to object to partial settlement). A non-settling defendant has standing to object to a settlement where the settlement will operate to deprive it of a legal claim, cause of action or contract right. In *Eichenholtz*, the Third Circuit held that the non-settling defendants had standing to object to the settlement because the corresponding bar order would extinguish their right to seek contribution from the settling defendants. In contrast, in *In re School Asbestos Litig.*, the Third Circuit held that the defendants lacked standing to object to the settlement because the settlement agreement did not limit any of their future claims.

In the present case, the terms of the proposed Approval and Bar Order would extinguish Arthur Andersen's potential

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Court's refusal to certify the settlement class at this time, the Court need not address the issue of the fairness, adequacy and reasonableness of the Settlement Agreement at this time.

claims for contribution and/or indemnification from Fishbein. Specifically, Paragraph 6(b) of the Approval and Bar Order provides as follows:

> All persons and entities (including but not limited to all parties to this action) are permanently barred and enjoined from filing or prosecuting any claim for contribution or indemnity, however denominated and regardless of the allegations, fact, law, theories or principles upon which it is based, against Fishbein & Company, P.C. which arises out of, relates to or is in any way connected with any act(s), failures(s) to act, transaction(s), practices(s) or conduct which was or could have been described in or made the subject of the actions captioned *Berger v. Jasmine, Ltd.*, Civil Action No. 96-CV-2318, and *McKowan Lowe & Co., Ltd. v. Jasmine, Ltd.*, Civil Action No. 94-CV-5522, in the United States District Court for the District of New Jersey. All of such persons shall be entitled to the damages reduction described in ¶ 5 of this order.

(Plaintiffs' Approval and Bar Order at ¶ 6(b)). The broad terms of the proposed Approval and Bar Order would operate to deprive the non-settling defendants of their right to file claims for contribution and/or indemnification from Fishbein for almost any activity that is or could be in any way associated with the facts underlying the present suit. Because the proposed settlement would extinguish Arthur Andersen's right to seek contribution or indemnification from Fishbein, the Court holds that Arthur Andersen has standing to object to the terms of the Settlement Agreement as it is currently written. In light of this Court's decision not to certify the settlement class at this time, it would be premature for the Court to reach a decision on the fairness, adequacy or reasonableness of the settlement as it now stands.

CONCLUSION

IT IS ORDERED on this 23rd day of September, 1999, that plaintiffs' motion [223] to certify a settlement class and to preliminarily approve a settlement agreement entered into with defendant Fishbein & Company, P.C. is *DENIED WITHOUT PREJUDICE.*

IT IS FURTHER ORDERED that plaintiffs' motion [245] for leave to file an overlength reply brief in support of this motion is *GRANTED.* Such overlength brief was considered by the Court.

IT IS FURTHER ORDERED that defendant Arthur Andersen's motion [253] for leave to file a surreply letter brief in further opposition to the motion at hand is *DENIED* as the Court does not find such a filing necessary for its determination of this motion.

/s/ Joseph H. Rodriguez
JOSEPH H. RODRIGUEZ
U.S.D.J.

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

[Filed Aug. 6, 1998]

Hon. Joseph H. Rodriguez
Civil Action No. 94-cv-5522

(Consolidated)

Civil Action No. 96-cv-2318

MCKOWAN LOWE & CO., LTD.,
Plaintiff,

v.

JASMINE LTD., *et al.*
Defendants.

HARRY BERGER, individually and on behalf of a class similarly situated,

Plaintiffs,

v.

JASMINE LTD. *et. al.*,
Defendants.

ORDER

This matter is before the court on motion of Harry Berger (Plaintiff in *Berger v. Jasmine, LTD.*, Civ. A. No. 96-2318) for class certification pursuant to Rules 23(a) and 23(b) of the Federal Rules of Civil Procedure. For the following reasons, the motion is denied.

BACKGROUND

The facts underlying this dispute are well-known and have been recently summarized in this Court's December 1, 1997 Order granting in part and denying in part Defendants' motions to dismiss the Revised Third Amended Complaint. The present motion for class certification was originally filed on August 4, 1997. In lieu of filing an Answer to the Revised Third Amended Complaint or responding to the class certification motion, the many Defendants filed their motions to dismiss, and the class certification motion was delayed pending the outcome of these motions.[1] Plaintiff renewed the class certification motion on February 19, 1998. Opposition was filed by defendants Melvin Twersky and Edward Maskaly, Fishbein & Company, P.C., and Arthur Andersen LLP. Defendants Irving Mangel, Samuel Mangel and Thomas J. Ciocco, by letters to the Court, joined in the Oppositions filed by the other Defendants. Thereafter, Plaintiff filed a Consolidated Reply. Plaintiff seeks certification of "a class consisting of all purchasers of publically-traded securities of Jasmine, Ltd. who purchased during the period from December 15, 1993 through and including June 20, 1995." Pl.'s Mot. for Class Certification at 1.

DISCUSSION

Rule 23 of the Federal Rules of Civil Procedure governs class actions. A plaintiff seeking class certification must first satisfy the four requirements of Rule 23(a):

> (a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the

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[1] The class certification motion was dismissed without prejudice on January 26, 1998, allowing Plaintiff to renew the motion at a later date.

> class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

See Liberty Lincoln Mercury, Inc. v. Ford Marketing Corp., 149 F.R.D. 65, 72 (D.N.J. 1993) ("A party bringing a motion for class certification pursuant to Fed. R. Civ. P. 23 . . . carries the burden of establishing all requirements of Rule 23."). Thus, the initial inquiry under Rule 23(a) can be summarized as requiring a showing of (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation. *See Georgine*, 83 F.3d at 624. Further, the plaintiff must also fall within one provision of Rule 23(b). *See Georgine v. Amchem Products Inc.*, 83 F. 3d 610, 624 (3d Cir. 1996) (citing *Wetzel v. Liberty Mutual Ins. Co.*, 508 F.2d 239, 248 (3d Cir.), *cert. denied*, 421 U. S. 1011 (1995)), *aff'd* __U.S.__, 117 S.Ct. 2231 (1997). In determining whether these requirements are met, the court is not permitted to consider the merits of the case. *Liberty Lincoln Mercury* 149 F.R.D. at 73 (citing *Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 177-78 (1974)); *In re Data Access Sys. Sec. Lit.,* 103 F.R.D. 130, 139 (D.N.J. 1984). The court may, however, "review the pleadings and the facts produced through discovery in making its determination." *Liberty Lincoln Mercury*, 149 F.R.D. at 73 (citing *Piel v. Nat'l Semiconductor Corp.,* 86 F.R.D. 357, 368 (E.D. Pa 1980)).

A. Numerosity

As Rule 23(a) states, the court must find that "the class is so numerous that joinder of all members is impracticable[.]" Fed. R. Civ. P. 23(a)(1). "The number of potential class members is not, in itself, determinative of this analysis, . . . and the moving party need not show the exact size of the proposed class to meet the requirement." *Liberty Lincoln Mercury,* 149 F.R.D. at 73 (internal citations omitted). *See Data Access Systems*, 103 F.R.D. at 137 ("The factors to be

considered for the numerosity requirement are the estimated number of parties in the proposed class, the expediency of joinder and the practicality of multiple lawsuits.").

Plaintiff claims that "[w]hile the exact number of persons who purchased Jasmine's stock cannot be determined without further discovery, the stock was traded in a fully developed and efficient market on the NASDAQ National Market System, making it likely that the Class numbers at least in the thousands and are geographically dispersed." Pl.'s Mot. for Class Certification at 7. Defendant Fishbein [2] specifically argues that "[a]s to the State Common Law Claims, however, Berger does not even try to guess how many of the purchasers actually relied upon the 1992 Report (as required for a plaintiff to succeed on the State Common Law Claims against Fishbein), and thus could even be in the class." Fishbein's Opp. Class Certification at 16. The other defendants do not directly contest the numerosity requirement. In light of the potentially large number of class members and the possibility that many of them could have relied (in some form or another) on Fishbein's 1992 audited financial statements which appeared in the prospectus, Plaintiff has met this requirement. *See Data Access Systems*, 103 F.R.D. at 137 ("[T]he Third Circuit has held that 'the interests of justice require that in a doubtful case . . . any error, if there is to be one, should be committed in favor of allowing the class action.'") (quoting *Kahan v. Rosenstiel*, 424 F.2d 161, 169 (3d Cir.) (quoting *Esplin v. Hirschi*, 402 F.2d 94, 101 (10th Cir. 1968), *cert. denied*, 394 U.S. 928 (1969)), *cert. denied*, 398 U.S. 950 (1970)).

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[2] Fishbein was named only in two counts of the Revised Third Amended Complaint for common law fraud and negligent misrepresentation. Therefore, in opposing Plaintiff's motion class certification, Fishbein limited its arguments to certification on these common law claims.

B. Commonality

"The commonality requirement will be satisfied if the named plaintiffs share at lease one question of fact or law with the grievances of the prospective class." *Baby Neal*, 43 F.3d at 56. This requirement has "generally been permissively applied to a large variety of factual circumstances including allegations of conspiracy and securities fraud." *Data Access Systems*, 103 F.R.D. at 137 (quoting *Piel v. National Semiconductor Corp.*, 86 F.R.D. 357, 364 (E.D. Pa. 1980)). Moreover, "[a] finding of commonalty does not require that all class members share identical claims, and indeed 'factual differences among the claims of the putative class members do not defeat certification.'" *In re Prudential Ins. Co. America Sales Practice Lit. Agent Actions*, 1998 WL 409156 at *20 (3d Cir., July 23, 1998) (quoting *Baby Neal*, 43 F.R.D. at 56).

Here, Plaintiff maintains that each potential class member has suffered identical violations of the federal securities laws, which by definition included a number of common questions of law and fact. Pl.'s Mot. for Class Certification at 8-9. Again, defendants do not directly contest this requirement, but focus on the requirement that the claims or defenses of the representative parties must be typical of the claims or defenses of the class. Fed. R. Civ. P. 23(a)(3). To some degree, these requirements are very similar, and as the Third Circuit recently reiterated, "[t]he concepts of commonality and typicality are broadly defined and tend to merge." *In re Prudential Ins. Co. America Sales Practice Lit. Actions*, 1998 WL 409156 at *20 (quoting *Baby Neal*, 43 F.R.D. at 56); *see also Georgine v. Amchem Prod., Inc.*, 83 F.3d 610, 632 (3d Cir. 1996). Thus, to the extent that these arguments also involve issues of commonality, they will be addressed below.

C. Typicality

"The typicality requirement is intended to preclude certification of those cases where the legal theories of the named plaintiffs potentially conflict with those of the absentees." *Georgine,* 83 F.3d at 631. Like commonality, the typicality requirement delves into the sufficiency of the class, but is also directed more at the adequacy of the named plaintiff rather than the named class. *Id.* at 632. In this respect it is somewhat akin to adequacy of representation, the fourth factor to be considered under Rule 23(a).

Plaintiff argues that his claims are typical of the proposed class because all class members seek to recover based on a common course of fraudulent conduct perpetrated by the many defendants in this case. Defendants, in contrast, state that there are many individualized differences in proving each class members' case.[3]

Indeed, this is not a run-of-the-mill securities fraud case. Plaintiff did not purchase during the limited window of the IPO, but from an over-allotment of shares approximately three weeks after the close of the IPO. Moreover, as Plaintiff testified in his deposition, he relied solely on the oral representations of his broker (an employee of Defendant Sands Brothers & Co., Ltd. who was also the underwriter of

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[3] In opposing Plaintiff's motion, Defendants argue that Plaintiff is without standing to pursue a Section 11 claim because he did not purchase the stock in the IPO. This issue, however, is an issue that need not be addressed in this motion, for "the question is not whether the . . . plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met." *Data Access Systems*, 103 F.R.D. at 137 (quoting *Eisen v. Carisle & Jacquelin*, 417 U.S. 156, 178 (1974) (quoting *Miller v. Mackey Int'l*, 452 F.2d 424, 427 (5th Cir. 1971))).

the IPO) and without even seeing the Prospectus beforehand.[4] He did not even receive the prospectus until at least a month after he purchased the stock. Berger Dep. at 35:17-18, 116:10-11. Thus, his reliance on this prospectus or other related documents such as the audit reports and the advice of Plaintiff's broker who was also an insider to the IPO, will be proved differently for Plaintiff than for those class members who may have only seen the prospectus (and/or other documents prepared by some of the named defendants) before purchasing the stock. The time of the purchase of the stock—whether it was purchased during the IPO or the short time frame following the IPO when Plaintiff purchased his shares—causes additional differences in proving each class members' case, possibly even affecting Plaintiff's standing to sue under Section 11. When considering these facts and the many permutations of proving reliance against the many defendants, in addition to the differing factual circumstances, it becomes evident that Plaintiff's claims and their anticipated methods of proof would not be typical of the class he seeks to represent and he has therefore not met the requirement of typicality.[5]

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[4] Q: Thank you. In what way did you rely on the accuracy of the prospectus in making your purchase decision?

A: In that particular case, I bought the stock before I even saw the prospectus, but I relied solely on Sands because the—with the underwriter and I took it forgranted [sic] that they had thoroughly examined the claims made in the prospectus, but my original purchase was made strictly because Sands assured me this is a good stock to buy. I finally—I got the prospectus later.

Berger Dep. at 126:8-18.

[5] In this respect, this case is different from cases such as *Eisenberg v. Gagnon*, 766 F.2d 770, 786 (3d Cir.), *cert. denied sub nom. Weinstein v. Eisenberg*, 474 U.S. 946 (1985). The shortcomings in meeting the typicality requirement in the instant case are not solely based on individual issues of reliance, but on the many unique circumstances that

D. Adequacy of Representation

"Adequacy of representation assures that the named plaintiffs' claims are not antagonistic to the class and that the attorneys for the class representatives are experienced and qualified to prosecute the claims on behalf of the entire class." *Baby Neal*, 43 F.3d at 55. In evaluating this requirement, "the Third Circuit considers (1) whether the named plaintiffs have interests antagonistic to those of the class and (2) whether plaintiff's counsel is qualified to conduct the proposed litigation." *Shamberg v. Ahlstrom*, 111 F.R.D. 689, 692 (D.N.J. 1986) (citing *Wetzel v. Liberty Mutual Ins. Co.*, 508 F.2d 239, 247 (3d Cir.), *cert. denied*, 421 U.S. 1011 (1975)). This requirement addresses concerns that "the representatives and their attorneys will competently, responsibly and vigorously prosecute the suit . . . ." *Liberty Lincoln Mercury*, 149 F.R.D. at 78. Of course, "[a] class representative 'need not be the best of all possible representatives, but rather one that will pursue a resolution of the controversy with the requisite vigor and in the interests of the class." *Id.* (quoting *Piel* 86 F.R.D. at 366). Here, the burden is on the defendants to show that the representation will be inadequate. *Data Access Systems*, 103 F.R.D. at 140.

Defendants, relying on Plaintiff's January 28, 1998 deposition, contend that Plaintiff is far from an adequate representative for the class because he has very little knowledge of the underlying case and the mechanics of a class action lawsuit, has relinquished all control to his counsel and refuses to pay for the costs of the lawsuit. They further claim that Plaintiff's counsel is inadequate for not properly

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will undoubtedly create "significant variations in the proofs of class members." *See Lerch v. Citizen First Bancorp, Inc.*, 144 F.R.D. 247, 257 (D.N.J. 1992).

informing him of his responsibilities.[6] Plaintiff responds that Defendants have not met their burden of showing inadequacy and that Plaintiff is an "exemplary" class representative.

It is clear from Plaintiff's deposition—which was taken over a year and a half after his case was filed—that he has little knowledge of the factual predicate of the suit:

> Q: Do you recall suing Fishbein and Company at the time the first Complaint was filed?
> A: I do not, and let me paraphrase it. I became the plaintiff, but I did not get myself involved in the day-to-day operation of this lawsuit. I turned responsibility over to the attorneys and just exactly what action they have taken from month-to-month or day-to-day I did not follow that. So, there was no specific instruction given by me to my attorneys what to do.
> Q: So, you left it to your attorneys to determine who to sue?
> A: Right. Exactly.
> Q: And when to sue them?
> A: Right.
> Q: And what claims to bring?
> A: Right.

Berger Dep. at 104:18-105:10. He even admitted: "Sir, I have no information whatsoever about Andersen's role in connection with Jasmin [sic]." Berger Dep. at 15:4-5. Moreover, it is clear that Plaintiff was never properly informed of his duties as class representative. After admitting

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[6] Andersen also argues that Plaintiff's deposition reveals that his federal securities claims are barred by the statute of limitations. This, like the standing issue, are not appropriately raised in this motion and need not be considered. Andersen also notes that Plaintiff failed to sue Fishbein within the statute of limitations for federal securities claims. This, however, can be considered in weighing the adequacy of Plaintiff's counsel's representation.

that he had not heard of the name of one of the law firms representing him, Plaintiff testified as follows:

> Q: Do you understand that you have certain duties as a class representative?
> A: Nobody has spelled out what my particular duties are.
> Q: You have no idea what you're supposed to do?
> A: No.
> Q: Do you—
> A: I think my duties were to select the proper firm, the proper legal firm to act as a plaintiff in this case.
> Q: Okay. And that's where they end?
> A: That's right.

Berger Dep. at 63:18-64:6.

More importantly, Plaintiff testified to his unwillingness to finance the litigation.[7] He stated that he had not received any bills in the case up to this point, and that he thought he was only responsible for the approximately $16,000 that was disclosed in the January 19, 1998 letter from Sachnoff & Weaver, Ltd. to Judge Kugler. Andersen's Ex. 7. There

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[7] There was also some concern regarding the fee agreement entered into between Plaintiff and his attorneys. In a December, 1997 hearing before Magistrate Judge Kugler, it was revealed that the fee agreement was oral. In response to Judge Kugler's concerns that the agreement be placed in writing, the terms were outlined in a letter from the firm of Sachnoff & Weaver, Ltd. dated January 19, 1998, disclosing the costs incurred to date by the firm of Miller Faucher Chertow Cafferty and Wexler and the firm of Futterman & Howard, Chtd., which totaled over $16,000. Andersen's Ex. 7 (Letter from Sachnoff & Weaver to Judge Kugler dated 1/19/98). This did not include or make mention of the costs incurred by Sachnoff & Weaver.

were, however, many more expenses incurred by Sachnoff & Weaver, costs which were apparently not made known to him:

Q: Are you aware that your lawyers sent a letter to the judge in Camden, New Jersey, informing him that this other law firm that is not the two that are in the former letter, Exhibit 7, but Sachnoff and Weaver to date have expenses, just disbursements that total $196,000?
A: I find out now.
Q: And are you—and in case you are not victorious in this lawsuit, are you willing to pay that $196,000?
A: I think I'm legally responsible for it. The case was given on a contingency basis.
Q: And you're willing to pay that amount?
A: No.
Q: You're not willing to pay that amount?
A: No, I'm not willing to pay that amount.
Q: You understand these are expenses, not fees?
A: Oh, these are expenses. $196,000 worth of expenses.
Q: Yes, Mr. Berger. Did you know that was the case?
A: No.
Q: Do you now—you now know as you sit here that your expenses to date are $196,000—
A: Plus—
Q: Plus the—plus the $16,000. Are you aware of that?
A: No. I'm aware of it now,
Q: And that's roughly speaking $220,000?
A: Yes.
Q: You're aware that—that this is the first time you're [sic] ever heard of that? Are you willing—are you willing to pay those expenses?
A: No.
Q: Did you ever—did you ever agree with your counsel you'd pay those expenses?

A: No.
Q: Are you also aware that the litigation is—has a long way to go before it's over?
Q: No.

* * *

Q: Well, have you agreed, Mr. Berger, to pay all disbursements should you not prevail in this case?
A: At this point I would say no. I will object.

Berger Dep. at 174:18-176:12, 178:10-12.

In *Data Access Systems*, Judge Brotman heard arguments similar to those made by the defendants in the instant case, to the effect that the plaintiffs were inadequate representatives because they were not willing and able to finance the litigation and that they were without sufficient knowledge to sufficiently pursue the case. 103 F.R.D. at 140. The court found that the named plaintiffs were able to finance the litigation and that the Rule 23(a)(4) inquiry need go no further. *Id.* Nonetheless, the court discussed the plaintiffs' apparent knowledge of the case, finding that the depositions revealed, as a whole, plaintiffs "to be knowledgeable and adequate class representatives, satisfying the 23(a)(4) requirement." *Id.* at 140-41. Thus, while knowledge did not appear to be the pivotal factor, the court put much emphasis on the named plaintiffs' ability to fund the litigation.

Likewise, the defendants in *Liberty Lincoln Mercury* raised concerns as to the plaintiff's financial ability to serve as class representative. 149 F.R.D. at 79. In contrast to the instant case, the president of plaintiff Liberty Lincoln Mercury indicated his willingness to personally guarantee the obligations incurred by the plaintiff in the action. *Id.* Noting that the plaintiff's financial condition was questionable and the subject of inconsistent representations, the court felt that it was of significant concern to whether the class should be certified. The court held that even if these concerns alone

would not defeat class certification, they contributed to the broader conclusion that revealed that the Rule 23 prerequisites were not met and certification was inappropriate. *Id.*

The standard for showing adequacy of representation in this situation is admittedly low. "A plaintiff need not have a complete knowledge of a case to be an adequate class representative. Indeed, he may even '[display] a complete ignorance of the facts concerning the transaction that he was challenging.'" *Shamberg*, 111 F.R.D. at 695 (quoting *Data Access Systems*, 103 F.R.D. at 140). However, Plaintiff's deposition reveals him to be, at the least, an extremely reluctant representative, and at the most, an unwilling one. The fact that Plaintiff testified that he was never explained his responsibilities or informed of the full amount of costs incurred is of no small concern, as it weighs heavily against the competency of Plaintiff's counsel to properly represent him and an entire class. His apparent unwillingness to finance the litigation is even more significant,[8] as clearly noted by the court in *Liberty Lincoln-Mercury*, 149 F.R.D. at 79 and *Data Access Systems*, 103 F.R.D. at 140.[9] Thus, even if this

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[8] Interestingly, Plaintiff only suffered a loss of the relatively small amount of $18,900 from the Jasmine stock, the recovery of which seems to be the principal reason he filed suit:

> Q: Would you agree, though, that's what you're seeking to be made whole, $18,900?
>
> A: Plus—plus, of course, all the legal expenses, which I am somehow responsible for.

Berger Dep. at 169:19-22.

[9] While these two cases focus on the ability of the plaintiff to fund the litigation rather than the willingness of the plaintiff to do so, the distinction is unimportant. Despite portions of Plaintiff's testimony that seem to indicate he feels powerless to resist the momentum of the litigation and its ongoing costs, he is free to withdraw from the lawsuit at any time, and cannot be forced to stay involved and be responsible for the

standing alone is not a sufficient reason to deny class certification, given Plaintiff's failure to meet the typicality requirement, it "add[s] to a picture which already indicates that the prerequisites to class certification have not been met and class certification is inappropriate." *Liberty Lincoln Mercury*, 149 F.R.D. at 79. Accordingly, Plaintiff's motion is denied.

CONCLUSION

IT IS ORDERED on this 5th day of August, 1998, that plaintiff's motion or class certification is *DENIED*.

/s/ Joseph H. Rodriguez
JOSEPH H. RODRIGUEZ
U.S.D.J.

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increasing and substantial costs of a class action such as this. In this [sic] event he chooses to withdrawal (which does not seem unlikely given his stated reluctance to pay the large costs already incurred), there will be no lawsuit in his name, and it makes no difference if it is by refusal or inability to pay.